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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 822

HAZEL ANNA WOLF, *Petitioner,*

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 24, 1956.

CITATIONS TO OPINIONS BELOW

The memorandum decision of the Board of Immigration Appeals, dated February 8, 1956, is quoted in full both in the unreported memorandum opinions of the District Court, and in the opinion of the Court of Appeals, each set forth in Appendix B, *infra,* pages 24 and 29. The opinion of the Court of Appeals, by Barnes, Circuit Judge, is set forth in Appendix B, *infra,* page 22, and reported in 238 F.2d 249.

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1956 (R. 78, *infra*, page 22). Rehearing was denied on January 19, 1957 (R. 79). The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the refusal of the Attorney General or his delegate to afford petitioner any hearing on an application for suspension of deportation under Section 244(a)(5) of the Immigration and Nationality Act of 1952 is a denial of due process of law.

2. Whether due process requires that an eligible alien applying for suspension of deportation must be afforded some opportunity to offer evidence of eligibility, good character and other circumstances of her life pertaining to the seventeen-year period between the assumption of her status of deportability and the date of the application.

3. Whether an alien *prima facie* eligible for suspension of deportation is entitled as a matter of right to make an application for suspension of deportation in the form and manner prescribed by the regulations, although her administrative hearing terminated prior to the enactment of the statute which first made the relief available to her.

STATUTE AND REGULATIONS INVOLVED

The pertinent provision of the Immigration and Nationality Act of 1952, relating to suspension of deportation (66 Stat. 214, 8 U.S.C.A. §1254(a)(5) and (c)) and the regulations involved (8 C.F.R. 6.21, 242.54(d), 242.61(a), and 450.1) are set forth as Appendix A, *infra*, pp. 17-21.

STATEMENT OF THE CASE

Petitioner has sought to apply for the discretionary relief of suspension of deportation pursuant to Section 244(a)(5) of the Immigration and Nationality Act of 1952 (R. 4). She is a fifty-nine year old Canadian-born woman who has resided continuously in the United States since 1922 (R. 2). It is undisputed on the record that during a period of more than ten years prior to February, 1956, she has been a person of good moral character, that her deportation would cause her, and her citizen child and five citizen grandchildren and her citizen brother and sister, exceptional and extremely unusual hardship, and that she has never been served with a final order of deportation issued pursuant to the Immigration and Nationality Act of 1952, although she was deportable under Sec. 241 (a) (6) of that Act (R. 5, 15, 16).

Petitioner was ordered deported under the Act of October 16, 1918, as amended,[1] as one who had been a voluntary member of the Communist Party in 1938 and 1939 (R. 3). Administrative proceedings in her case were concluded prior to the effective date of the Immigration and Nationality Act of 1952 (R. 42, 53), which

[1] Now 8 U.S.C.A. §1251.

afforded to aliens of her class for the first time the right to apply to the Attorney General for the discretionary relief of suspension of deportation. Having unsuccessfully contested her deportability in court proceedings, *Wolf v. Boyd*, 215 F.2d 377,[2] and other relief having been unavailing,[3] petitioner endeavored to apply for suspension of deportation by filing a motion with the Board of Immigration Appeals to reopen the administrative proceeding in order to make application for suspension of deportation on the form prescribed by the regulations[4] (R. 4, 15-16). In invoking relief in this manner she followed a well precedented procedure.[5] The

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[2] Cert. den. 348 U.S. 951, Feb. 28, 1955. For convenience, the opinion of the court below in that case involving the substantive issue of deportability is printed as Appendix D, *infra*, p. 62.

[3] Senator William N. Langer introduced a private bill in her behalf, S. 1425, 84th Cong., 1st Sess. (R. 12, 67, 68). No action, favorable or adverse, was taken on this bill (R. 68), but her deportation was stayed while it was pending (R. 3, 12).

[4] Form I-256-A, prescribed by 8 C.F.R. 450.1, and required as the form upon which an application for suspension of deportation is to be made by C.F.R. 242.54(d), Appendix A, *infra*, p. 20.

[5] 8 C.F.R. 244.2 and 8 C.F.R. 242.54(d) require that an application for suspension of deportation be made before a special inquiry officer in the course of an administrative hearing. In the cases of the numerous aliens whose administrative hearings were closed before Section 244 of the 1952 Act made discretionary relief available, compliance with this requirement would be impossible. In such cases the Immigration and Naturalization Service has required as a matter of practice that a motion be made to the Board of Immigration Appeals setting forth the eligibility of the alien under the statute. If a *prima facie* case of eligibility is shown in the moving papers, an order is entered reopening the proceedings and referring the matter for hearing before a special inquiry officer. Examples of this procedure are printed as Appendix C, *infra*, p. 49, namely: the *Jay* case, before the court as *Jay v. Boyd*, 351 U.S. 345, *infra*, p. 49; the *Crain* case, before the court below as *Crain v. Boyd*, 237 F.2d 927, *infra*, p. 51; the *Garph* case, *infra*, p. 54; and the *Hobson* case, *infra*, p. 57. The latter cases have not been subject to court review. All of these procedural examples were cited to the district court. That court ruled that the question of the usual or customary practice was irrelevant in view of its ultimate ruling (R. 50, 51). On

Board of Immigration Appeals, however, refused to allow petitioner to file an application for suspension of deportation, or to afford her a hearing before a special inquiry officer by entering an order denying her motion to reopen the proceedings, stating in conclusion that "After a careful review of the record, it is our considered opinion that a reopening of the proceeding is not warranted . . . "[6] (R. 19).

The only record before the Board for review, other than petitioner's moving papers setting forth her eligibility in the language of the statute, was that of the earlier deportation proceedings (R. 48, 49, 50), relating exclusively to petitioner's acts or status in 1938 and 1939.[7] The evidence relating to petitioner in that case was limited to testimony that she had attended meetings and had been a member of the Communist Party in 1938 and 1939, having been ordered expelled in 1939 (Appendix E, *infra*, p. 66). No testimony was considered, nor was any relevant, as to her character or conduct subsequent to those years.

Upon being ordered to surrender for immediate deportation, petitioner commenced habeas corpus proceedings in the district court and sought a review of the

[6]The full text of the Board's memorandum decision (R. 18-20) is quoted both in the district court's decision, and in the opinion of the circuit court, Appendix B, *infra*, p. 39 and p. 24.

[7]The pertinent portions of the decision of the hearing officer in that case in which he considers the evidence of record relating to petitioner is printed in Appendix E, *infra*, p. 66, particularly at pp. 68 *ff*. The opinion of the court below is printed as Appendix D, *infra*, p. 62.

December 8, 1954, by regulation effective January 3, 1955, the Service for the first time officially recognized this procedure by referring to motions to reopen "for the purpose of applying for suspension of deportation." 19 F.R. 8053; 8 C.F.R. 6.21, Appendix A, *infra*, p. 19.

refusal of the Board to permit her to file an application for suspension of deportation (R. 1, 5, 6), claiming that she had been denied her statutory right to a hearing, and to an exercise of discretion by the Attorney General (R. 5 and 6).

The district court concluded as a matter of law that she was entitled to make application for discretionary relief, and to have such application considered by the Attorney General or his authorized delegate (R. 54), found as a matter of fact that the Board had considered "the entire record with respect to the earlier administrative proceedings" (R. 48, 49, 54), and held that, as a matter of law, in denying her motion to reopen the deportation proceedings, it had exercised the discretionary power of the Attorney General adversely (R. 55). The petition for a writ of habeas corpus was dismissed and the relief sought denied (R. 56, 57).

The circuit court affirmed the order on appeal, holding that the Board of Immigration Appeals had "given petitioner a hearing and ruled against her" (R. 73), and that the Board, as the Attorney General's delegate, had in fact exercised its discretion against her because she had declined to testify in the substantive proceeding commenced in 1949, and had failed in her motion to reopen to state specifically that she was no longer a member of the Communist Party, or when her membership had terminated (R. 76), and because the motion to reopen was procedurally defective, in failing to allege that she was not subject to criminal proceedings under Section 242 (e) of the Act, nor the subject of *any* pending criminal proceedings, although, in fact, she was not (R. 74, 75).

REASONS FOR GRANTING THE WRIT

The deportation of a fifty-nine year old mother and grandmother, severing the ties with family and friends which have been established in a period of thirty-five years' continuous residence, is severe punishment for conduct which was not made unlawful until many years after its occurrence. The disproportionately tragic consequences of a misstep seventeen years earlier underlines the importance of any relief which the law may afford from otherwise mandatory enforcement.

The possibility of relief was made available to aliens of petitioner's class for the first time in section 244 (a)(5) of the Immigration and Nationality Act of 1952, which became effective after the conclusion of the administrative proceedings in her case. If she can prove her physical presence in the United States, and her good character, continuously from 1939, a period of more than ten years, and exceptional and extremely unusual hardship resulting from her deportation,[8] she has the statutory right to have an application for suspension of deportation heard by the Attorney General or his delegate, and to an exercise of his discretion. Has that right been afforded her in this case?

1.

In *Jay v. Boyd,* 351 U.S. 245, a majority of the court assumed that there was "a statutory right to a full and fair hearing" on the issues of eligibility for discretionary relief. The dissenting members of the court regarded a proceeding in which non-record confidential

[8] She must also prove deportability under section 241(a), and that she has not been served with a final order of deportation under "this Act," i.e., the Immigration and Nationality Act of 1952.

information was considered by subordinate officers of the Immigration and Naturalization Service in denying an application for suspension of deportation as an abrogation of the right to a fair hearing.[9] In this case, however, petitioner was not given *any* hearing. She was not permitted to present evidence either on factors of eligibility, or on matters which might persuade the Attorney General or his delegate to act favorably on her application. The opinion below states that "clearly petitioner is not entitled to a hearing as a matter of right . . . ," *infra,* p. 28. It was the view of the court below that the denial by the Board of her motion to re-open proceedings for the purpose of making application for discretionary relief was itself an exercise of discretion adverse to her.

The court below apparently failed to recognize that the 1952 Act made a "significant change" in the law in affording an alien the right to make application and to prove the qualifying factors, and in requiring a finding on these factors by the Attorney General or his delegate. An alien may be "unable to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension," but he has the statutory right to attempt to prove the qualifying factors, upon showing *prima facie* eligibility, and to be heard on those matters which may persuade the Attor-

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[9] Following the decision in *Jay* the regulations pertaining to the use of confidential information were revoked (21 FR 8493) so that subordinate officers of the Service are no longer permitted to consider non-record information in reaching decisions on applications for suspension of deportation. New York Times, Nov. 1, 1956, p. 27, col. 2. A number of pending cases in which such information had been used, as the basis for denial of suspension are being re-examined by the Service, *e.g., Crain v. Boyd,* 237 F.2d 927, *cf., infra,* p. 51.

ney General to act favorably. *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 268. He is entitled to a fair hearing, and only if he specifically waives that right will due process be satisfied with less. *Marcello v. Bonds,* 349 U.S. 302.

2.

Even assuming that circumstances peculiar to this case would justify the denial of a right to a hearing such as is provided for aliens whose cases remained open after the passage of the 1952 Act, petitioner was clearly entitled to consideration by the Attorney General of those favorable factors of good character and exceptional hardship over the seventeen-year period after the occurrences which resulted in the finding of deportability. While the statute may not limit the consideration of the Attorney General to matters occurring precisely within the minimum time limit during which good character must be shown to establish eligibility,[10] for the Board to decide the case on a record which relates exclusively to matters occurring seventeen years ago, as was done here, violates the plainly expressed Congressional intent by disregarding the criteria explicity set forth in the statute. The District Court found as fact that the Board has based its decision "upon a review of petitioner's entire record *with respect to the earlier administrative proceedings*" (R. 54). These earlier proceedings contain no evidence whatever as to petitioner's conduct or character in the intervening years between 1939, when she was assertedly expelled

[10] *Cf. United States ex rel. Adel v. Shaughnessy,* 183 F.2d 371 (2d Cir., 1950). This case, however, was decided under the former statute, 8 U.S.C.A. 155(c), as amended July 1, 1948.

from the Communist Party, and 1956, when she sought suspension of deportation[11] (Appendix E, *infra*, p. 66). A denial of relief based upon a record relating exclusively to matters occurring prior to the period explicitly designated by the statute as the basis for determining eligibility for suspension of deportation, *i.e.*, "a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation," is a failure to exercise discretion at all. The sanctioning of such wrongful refusal to exercise discretion in the manner required by the statute by the courts below appears to be such a plain departure from the accepted and usual course of judicial procedure as to call for the exercise of this court's power of supervision.[12]

3.

Sec. 244 of the act gave petitioner the right to submit an *application* for discretionary relief and to have it considered. The word "application" is used explicitly in subsection (c). The *form* of application is not specified in the statute, but the Attorney General has specified its contents in a regulation having the force and

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[11] Both the opinion of the court below, and the memorandum decision of the Board lay special emphasis upon the failure of petitioner to testify on her own behalf as a witness in the substantive hearing on deportability, and seem to reach the conclusion that this alone would justify denial of any consideration of her application for suspension of deportation, without regard to any testimony as to good conduct during the intervening seventeen years. It is true that had she denied membership in the Communist Party a different result might have been reached on the issue of deportability, but, on the other hand, had she admitted membership prior to 1939, any testimony as to good conduct and character since would have been irrelevant since, in that hearing, the relief she now seeks was unavailable.

[12] *Mastrapasqua v. Shaughnessy*, 180 F.2d 999 (2d Cir., 1950)

effect of law. This form, I-256A, is six pages in length and calls for a detailed account of petitioner's parentage, nationality, entry, employment, family status and personal history, criminal record, if any, association and membership, and other personal circumstances and habits, over the entire period of petitioner's life, but with special emphasis on the years pertinent to establishing eligibility under the statute. 8 C.F.R. 450.1. Further regulations, applicable to the suspension of deportation, provide that the application, on the form prescribed, shall be submitted, and considered by a special inquiry officer in an administrative hearing conducted by a special inquiry officer in accordance with the applicable regulations. 8 C.F.R. 244.2; 242.54(d); 242.53 and 242.61.

No specific regulation sets forth how an alien whose hearing was closed prior to the time that suspension of deportation became available, may apply for suspension, but in practice the Service has required the alien to file a motion with the Board of Immigration Appeals to reopen the administrative hearing, setting forth *prima facie* eligibility in the motion. When the case has been ordered reopened by the Board the procedure followed is in accordance with 8 C.F.R. 242.53 and 242.54 (d). *Jay v. Boyd,* 351 U.S. 345. See Appendix C, *infra,* p. 49. Neither the regulations, nor any practice of the Service, authorizes the submission of application form I-256A to the Board of Immigration Appeals initially. The Board is a reviewing and supervisory body which considers suspension cases only on appeal, or on referral from the special inquiry officer who has heard the evidence in support of the application in accordance

with the appropriate regulations.[13] The procedure followed by petitioner was as nearly as possible that prescribed by the regulations, and precisely that procedure approved in practice by the Service in similar cases.[14] Having followed the usual and prescribed pro-

[13] The Circuit Court opinion states, R. 70, *infra*, page 27; "Petitioner in effect asserts that because she sees fit to designate her petition a 'Motion to Reopen' rather than 'Application for Suspension of Deportation,' she is entitled as of *right* to an order reopening the matter, and thereafter the right to submit evidence, after which the Attorney General, through his designate, the Board of Immigration Appeals, may exercise discretion as to whether or not the alien should be deported.

"Petitioner in effect desires to set up her own rules of procedure as to how and when this discretionary judgment may be exercised."

This statement seems particularly inappropriate in view of the specific definition of "Application for Suspension of Deportation," Form I-256A in 8 C.F.R. 450.1.

Likewise the court below appeared to misunderstand the significance of the "cases allegedly similar in facts" R. 77, offered in evidence by petitioner, R. 50, 51, printed as Appendix C., *infra*, p. 49. These cases were not cited because "the Board of Immigration Appeals has exercised its favorable discretion" in them. On the contrary, in the *Jay*, *Crain* and *Hobson* cases the special inquiry officer denied suspension of deportation, relying upon "confidential information." The Board of Immigration Appeals affirmed. In the *Garph* case suspension of deportation was recommended by the special inquiry officer, and the matter has not yet reached the Board. These cases were cited solely to illustrate the established procedure in cases where the administrative record was closed prior to the effective date of the 1952 act. This apparent confusion on the part of the Court of Appeals stems from its failure to understand that an *application* for suspension of deportation is a particular and specific document prescribed by the regulations in accordance with the mandate of the statute.

[14] A procedural defect in petitioner's motion to reopen was noted and criticized both by the Board and by the Court of Appeals. 8 C.F.R. 6.21, as amended December 8, 1954, 19 F.R. 8053, requires that a motion to reopen or reconsider, either in the substantive proceedings, or for the purpose of seeking discretionary relief, include a statement by or on behalf of the moving party declaring "whether or not the subject of the deportation order is the subject of any criminal proceedings under Sec. 242(e) of the act," and whether or not he is "subject to any pending criminal prosecution." 8 C.F.R. 6.21. The prior regulation 17 F.R. 11469, December 18, 1952, contained no such requirement. Petitioner's moving papers did not include this statement.

Petitioner was not in fact subject to any such proceedings. R. 22, 75. This procedural defect was not specifically discussed in the District

cedure, petitioner was entitled to what the statute, the regulations, and the practice of the Immigration and Naturalization Service provided: a hearing on her application for suspension of deportation, with opportunity to present evidence in support of the application, and to an exercise of the Attorney General's discretion based upon the record made. *U. S. ex rel. Accardi v. Shaughnessy,* 347 U.S. 260.[15]

4.

The implications of this case extend far beyond the immediate interests of this petitioner. The sanctioning, by the courts below, of the denial of the right to file the prescribed form of application, the asserted exercise of discretion solely on the basis of an administrative proceeding relating exclusively to matters in the remote past, and the denial of a hearing on suspension of de-

[15] *Arakas v. Zimmerman*, 200 F.2d 322 (3rd Cir. 1952), *U. S. ex rel. Adel v. Shaughnessy*, 183 F.2d 371 (2d Cir. 1950), and *Kavadias v. Cross*, 82 F. Supp. 716 (N.D., Ind. 1948) reversed on other grounds, 177 F. 2d 497 (7th Cir. 1949), see *U. S. ex rel. Zabadlija v. Garfinkel*, 173 F.2d 222 (7th Cir. 1949) cited by the court below, were decided under the earlier law, Sec. 19 (c) (2) of the Immigration Act of 1917; 8 U.S.C.A. (1940 Ed.) Sec. 155 (c) (2), which did not give to an alien the statutory right to file an application for suspension, and under entirely different regulations with dissimilar provisions respecting hearings. These cases have no application to the present law and regulations.

Court memorandum decision, and was immaterial in view of the holding of the court that discretion had actually been exercised. Although discussed, it is not a part of the holding of the Circuit Court, which likewise took the view that there had been an actual exercise of discretion, constituting full compliance with the statute, in the Board's denial of the motion to reopen, the "entire record" having been reviewed.

If the motion had been denied solely because of this procedural defect, petitioner could have submitted a new motion remedying the defect, and thus opening the way for the filing of the application. The decision below, however, seems to preclude this course by holding that the motion to reopen was an application under the statute, that it was properly passed upon, that the application was denied, and that thus the statutory discretion had been exercised.

portation importantly affect the administration of laws pertaining both to immigration, and to naturalization. A very considerable number of aliens now resident in the United States have been ordered deported in administrative proceedings concluded prior to 1952, and are entitled to apply for discretionary relief under Sec. 244 of the 1952 Act. Petitioner has no precise information on the number of aliens affected, but it is believed to number several thousand.[16] Unquestionably thousands of such aliens against whom deportation orders are outstanding, but who for one reason or another have not been deported from the United States, are eligible for the relief afforded by the 1952 statute under circumstances substantially similar to that involving this petitioner. Deportation in many of these cases would unquestionably involve exceptional and extremely unusual hardship, and the persons affected would be eligible for the statutory relief.

Moreover many of such persons, long resident in the United States, who have established firm ties, would be eligible for naturalization except for the outstanding deportation orders. Under the present naturalization

[16] In a study of "Political Deportations in the United States" conducted in 1954 by the National Lawyers Guild it was found that of some 5000 cases studied, well over 500 as to whom deportation orders had been entered, were not shown to have been actually expelled from the United States, and are presumably still residents. 14 L. Guild Rev. 93. Since political deportations constitute only a small fraction of total deportations, see Maslow, "Recasting Our Deportation Law," 56 Col. L. Rev. 309, 322-323, presumably the number of aliens as to whom there are outstanding deportation orders, issued prior to 1952, but who still reside in the United States, is many times five hundred. Counsel for petitioner personally knows of at least six cases (all political) in the Seattle area alone, where administrative proceedings have concluded with an order of deportation prior to December 24, 1952, and whose subjects, still resident in the United States, are potentially eligible for the relief provided by the 1952 statute.

law, suspension of deportation in such cases is a prerequisite step to the filing of a petition for naturalization.[17] If the determination of suspension of deportation may properly be based upon matters occurring from 15 to 30 or 40 years in the past, to the exclusion of matters which may show civic devotion and loyalty to the United States during the intervening years, the spirit of the naturalization statute and both the spirit and the letter of Section 244 will be nullified.

In determining that the Board of Immigration Appeals may act to deny suspension without consideration of positive factors demonstrable during the intervening years after the act or status resulting in deportability, the courts below sanctioned a procedure believed to be violative of due process which potentially affects a large class of aliens whose daily conduct for decades may demonstrate a genuine repentance for past mistakes.

The Court of Appeals appears to have decided this question in a manner that is in conflict with the *Accardi* case and to have so far departed from the accepted and usual course of judicial proceedings, in reviewing the administrative action here involved, as to call for an exercise of this court's power of supervision.[18]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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DWIGHT N. STEVENS,
Counsel for Petitioner.

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[17] 8 U.S.C.A. §1429. See *Shomburg v. United States*, 348 U.S. 540.
[18] cf. *Mastrapasqua v. Shaughnessy*, 180 F.2d 999 (2d Cir. 1950).

APPENDIX A

STATUTE

Sections 244 (a) (5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 214, 8 U.S.C.A. 1254 (a) (5) and (6):

"Sec. 244 (a). As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

" * * *

(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his

spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence."

* * * * * * * *

"(c) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (4) or (5) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such lien, the Attorney General shall thereupon deport such alien in the manner provided by law."

REGULATIONS

Title 8, Code of Federal Regulations.

19 F.R. 8053, promulgated December 8, 1954, effective January 3, 1955.

Section 6.21 Motion to Reopen or Motion to Reconsider—(a) Form

Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument if desired shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decisions as are pertinent. In any case in which a deportation order is in effect, there shall be included in the motion to reopen or reconsider that order a statement by or on behalf of the moving party declaring whether or not the subject of the deportation order is also the subject of any pending criminal proceedings under Section 242 (e) of the Immigration and Nationality Act and, if so, the current status of that proceeding. If the motion to reopen or reconsider is for the purpose of seeking discretionary relief, there shall be included in the motion a statement by or on behalf of the moving party declaring whether or not the alien for whose relief the motion is filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the district director, or the officer in charge having administrative jurisdiction over the case.

20 F.R. 3495, promulgated May 19, 1955.

Section 242.54 Contents of Records; Evidence

* * * * * * * *

(d) Application for discretionary relief

Except in the case of an alien who is *prima facie* deportable under Section 242(f) of the act, at any time during the hearing the respondent may apply for suspension of deportation on form I-256A, for voluntary departure, under section 244 of the Act, or for both voluntary departure and pre-examination. The burden of establishing that he meets the statutory requirements for discretionary relief shall be upon the respondent. He may submit any evidence in support of his application which he believes should be considered by the special inquiry officer.

17 F.R. 11560, promulgated December 19, 1952.

Section 450.1 Prescribed Forms

The following forms are hereby prescribed by the Attorney General for use in compliance with the provisions of this chapter:

Form No.	*Title and Description*
* * * * * * * *	
I-256A	Application for Suspension of Deportation

17 F.R. 11515, promulgated December 19, 1952.

Section 242.61 Decision of Special Inquiry Officer

(a) Except as provided in paragraph (b) of this section and Sec. 242.76, the special inquiry officer shall, as soon as practicable after the conclusion of the hearing, prepare a written decision signed by him which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law, as to deportability, unless such findings and conclusions are

waived by the respondent orally during the hearing or by written waiver after the conclusion of the hearing. If respondent has applied for discretionary relief in accordance with the provisions of Sec. 242.54(d), the decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such application. The decision shall be concluded with the order of the special inquiry officer as provided in paragraph (c) of this section.

* * * * * * * *

17 F.R. 11517, promulgated December 19, 1952.

Section 244.2 Suspension of Deportation

An application for suspension of deportation shall be submitted in accordance with, and subject to, the provisions of Sec. 242.54 (d) of this chapter and shall be determined and disposed of in accordance with the provisions of this part and Sec. 242.61 of this chapter.

APPENDIX B

Court of Appeals Decision

HAZEL ANNA WOLF, *Appellant*,
vs.
JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Appellee*.

No. 15,101
Oct. 24, 1956

Appeal from the United States District Court for the Western District of Washington, Northern Division

Before: DENMAN, Chief Judge, BONE and BARNES, Circuit Judges

BARNES, Circuit Judge:

Petitioner admittedly is subject to, and under an order for deportation. Such order is valid and final. Her original hearing started in 1949. In 1951 she was found deportable by the Hearing Officer, on the charges contained in the warrant of arrest, namely, that she was a member of an organization which advocated the overthrow of the Government of the United States, that she circulated written and printed matter so advocating, and that after her entry she was an alien who was a member of the Communist Party of the United States.

In 1952, the petitioner appealed to the Commissioner of Immigration. He adopted the decision of the Hearing Officer. Later that year an appeal was dismissed by the Board of Immigration Appeals.

Petitioner instituted an action for judicial review in the District Court. This was heard and ordered dismissed in 1953; and the dismissal was affirmed in this court in 1954, with rehearing denied. (*Wolf v. Boyd*, 215 Fed. (2) 377).

In 1955 the Supreme Court denied her petition for certiorari (348 U.S. 951).

As the lower court so aptly stated in this proceeding:

> "It is conceded by petitioner for the purpose of this action at least that all proceedings resulting in the order and warrant of deportation were fair, regular, and in compliance with statute, and that she has exhausted judicial review except so far as it may relate to an application to suspend deportation under the provisions of Sec. 244 of the Immigration and Nationality Act of 1952."

This is a judicial review of such an application heretofore denied by the District Court on January 27, 1956. Petitioner had filed a motion to reopen the deportation proceedings. It was addressed to the Board of Immigration Appeals, and was based on the 1952 Act (8 USCA 8, §1254(a) (5)).

Petitioner alleges that she came within "each and every one of the provisions of Sec. 244(a) (5)" in that:

> (a) She was deportable under Paragraph 6 of Sec. 241(a) (although she had been ordered deported under the 1918 Act);
>
> (b) For an act committed or status acquired subsequent to such entry;
>
> (c) She had been physically present for not less than ten years within the United States, since the commission of the act or assumption of the status;
>
> (d) She can prove, and offers to prove, that during all such period she has been and is of good moral character;
>
> (e) She has not been served with a final order of deportation issued pursuant to the 1952 Act; and
>
> (f) She is a person whose deportation would result in exceptional and extremely unusual hardship "to the alien, and to child, her five grandchildren, her sister and her brother," all of whom were citizens of the United States.

It should be noted parenthetically that after the denial of certiorari by the Supreme Court, a private bill, S. 1425, was introduced on petitioner's behalf by Senator Langer. Petitioner was granted a stay of deportation, both when this bill was introduced in the Senate, and subsequently, when petitioner filed her motion to reopen proceedings before the Board of Immigration Appeals.

Apparently no action, favorable or adverse, was taken upon this bill, either by the Senate or by the Judiciary Committee thereof.

On February 8, 1956, the Board of Immigration Appeals denied petitioner's motion to reopen the hearings. A copy of its memorandum decision reads as follows:

> "This case is before us on counsel's motion for reopening which was filed on January 27, 1956.
>
> On November 5, 1952, we dismissed the respondent's appeal from a decision of the Acting Assistant Commissioner, directing deportation on two charges based on the Act of October 16, 1918 as amended by the Alien Registration Act of 1940, 8 U.S.C. 137. Thereafter habeas corpus proceedings were instituted by the respondent which resulted in a decision adverse to her in the United States District Court. This judgment was affirmed by the United States Court of Appeals of the Ninth Circuit on August 10, 1954, and a rehearing was denied on October 11, 1954. *Wolf v. Boyd*, 215 F.2d 377 (C.A. 9, 1954). On February 28, 1955 certiorari was denied, 348 U.S. 951. The present motion seeks to have the hearings reopened to permit the respondent to file an application for suspension of deportation under the provisions of Section 244(a)(5) of the Immigration and Nationality Act. We have previously held that an application for dis-

cretionary relief must be submitted during the Immigration hearing. *Matter of M*....., 5 I&N Dec. 472 (1953); *Matter of C*....., 5 I&N Dec. 630 (1954). In *Marcello v. Boyd,* 349 U.S. 302, 313 (1955) the court said that this Board was not bound to consider the question of suspending deportation on the merits where the alien had failed to make an application for that relief at the hearing before the special inquiry officer. Our decisions in *Matter of M*..... and *Matter of C*....., *supra,* are not controlling because the respondent was not eligible for suspension of deportation under the legislation which was in effect when the hearing was closed on February 12, 1951. However, they do indicate the necessity for promptness in making such an application. The Immigration and Nationality Act became law on June 27, 1952, and was effective on December 24, 1952. Over three years have elapsed from the latter date and the motion to reopen contains no explanation for the delay in its submission. We note that the Supreme Court handed down its decision in the respondent's case on February 28, 1955, and that counsel's affidavit in support of the motion is dated March 16, 1955. A serious administrative problem would be created for the Service if we were to sanction a procedure by which counsel could remain inactive until deportation was imminent and then upset the proceeding with a motion to reopen for discretionary relief which apparently could have been submitted at any time after December 24, 1952.

The respondent declined to testify at the hearing on the advice of counsel, the motion to reopen contains no information as to whether the respondent admits that she was a member of the Communist

Party and if so, whether such membership has terminated and the date of termination. 8 C.F.R. 6.21 provides that motions to reopen shall be supported by affidavits or other evidentiary material. As applied to this respondent, who is attempting to secure the exercise of administrative discretion, we believe this regulation made it incumbent upon her to furnish her own affidavit concerning the period of her membership in the Communist Party, the extent of her activities while a member, the date when she terminated her membership, and detailed information as to the hardship which would result to her if she is deported.

8 C.F.R. 6.21 also provides that in any case in which a deportation order is in effect, there shall be included in the motion to reopen a statement by or on behalf of the moving party declaring whether or not the alien is the subject of any criminal proceeding under Section 242(e) of the Immigration and Nationality Act and, where the motion is for the purpose of securing discretionary relief, there is to be included a statement as to whether or not the alien is subject to any pending criminal prosecution. The motion fails to comply with these two requirements.

It is well settled that a rehearing in an administrative proceeding is not a matter of right but lies within the discretion of the agency making the order. *United States et al. v. Pierce Auto Freight Lines, Inc., et al.*, 327 U.S. 515, 535 (1946); *Interstate Commerce Commission et al. v. City of Jersey City et al.*, 322 U.S. 503, 514 (1944). The facts asserted in the motion to reopen are not persuasive that this case merits the exercise of the discretionary authority to suspend deportation.

After careful review of the record, it is our con-

sidered opinion that a reopening of the proceeding is not warranted and counsel's motion will, therefore, be denied.

ORDER: It is ordered that counsel's motion be and the same is hereby denied.

Thos. G. Finucane
Chairman, Board of
Immigration Appeals"

This discloses that the Board denied the motion, but only after examining the facts asserted by petitioner in the motion to reopen, and after a careful review of the entire record. This the Board was entitled to do. *Adel v. Shaughnessy,* 183 F.2d 371; *Arakas v. Zimmerman,* 200 F.2d 322.

Petitioner in effect asserts that because she sees fit to designate her petition a "Motion to Reopen" rather than "Application for Suspension of Deportation," she is entitled, as of *right* to an order reopening the matter, and thereafter the right to submit evidence, after which the Attorney General, through his designate, the Board of Immigration Appeals, may exercise discretion as to whether or not the alien should be deported.

Petitioner in effect desires to set up her own rules of procedure as to how and when this discretionary judgment must be exercised.

As the lower court pointed out:

> "We are concerned solely with whether petitioner has been granted procedural due process with respect to an act of grace that may be granted petitioner by the Attorney General,"

after she has made a showing of compliance with the provisions of Section 244(c) of the Immigration and Nationality Act of 1952. 8 U.S.C. 1254(c).

To determine this question it is necessary not only to consider the requirements of the section, but likewise

the requirements of the regulations which have been adopted to supplement Section 244. Under the renumbered regulations (8 C.F.R.) we find that Section 244 of the Act is governed by regulations bearing the same number, and Section 244.2 of such regulations relates to suspension of deportation. It provides that any application for suspension of deportation "shall be submitted in accordance with, and subject to, the provisions of Section 242.54(d). . . . " which in turn permits filing of applications "at any time during the hearing. . . . The burden of establishing that he meets the statutory requirements for discretionary relief shall be upon the respondent. He may submit any evidence in support of his application which he believes should be considered by a special enquiry officer."

Obviously petitioner could not follow the requirements of the regulations. She therefore insists that she has the right to first make a motion to the Board of Immigration Appeals to reopen the closed case, and *thereafter* present evidence on the issue of discretionary relief.

In *Accardi v. Shaughnessy,* 347 U.S. 260, the Supreme Court went into the nature and effect of the regulation "prescribing the procedure to be followed in processing an alien's application for suspension of deportation."[1]

Clearly petitioner is not entitled to a hearing as a matter of right, if the Board has exercised its discretion.

[1] It is true that in the *Accardi* case, such regulations were those in effect under Section 19c of the 1917 Act (8 U.S.C. Sec. 155(c)). But in this same case, the Court points out the existence of corresponding sections under the 1952 Act (8 C.F.R., Rev. 1952, Pts. 242-244 & 6). (*Accardi v. Shaughnessy*, 347 U.S. 260, at 265). It holds that these regulations have the "force and effect of law," and supplement the bare bones of the statute.

As Judge Frank of the Second Circuit said in the *Adel* case:

> "The courts cannot review the exercise of such discretion; they can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion."

Adel v. Shaughnessy, 183 F.2d 371 (1950).

In the *Kaloudis* case, decided earlier that year, the facts affirmatively showed a hardship case. The hearing inspector found that deportation "would result in serious economic detriment" to petitioner's wife and child; that petitioner was eligible for suspension of deportation, yet that it should not be granted.

Judge Learned Hand, in passing on this sympathy provoking factual situation, had this to say:

> "The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate. The relator does not challenge the test here applied, so far as concerns the deportation order itself; he agrees that, so far as his interest in residing in this country was protected by statute—in so far as it was 'a legally protected interest'—it had been forfeited. *His position is that, being concededly eligible for suspension of deportation, he was entitled to the exercise of the Attorney General's discretion, and that it appears that this has not been in fact exercised in accordance with the limitations, which must be assumed to confine it.* Unless he is to be permitted a hearing to show that it has not been so exercised, he says that he will be denied 'due process of law.' It does not appear from

the record that the Attorney General—through the Board, his delegate—has exercised his discretion in disregard of any implied limitations. We will assume arguendo that the contrary might appear: *i.e.,* that the reason given might be clearly irrelevant that a court could say that the Attorney General had transgressed the statute. Suppose, for example, that he denied suspension because the alien had become too addicted to attending baseball games, or had bad table manners. But membership, even past membership, in an organization which the Attorney General has 'proscribed' may make an alien's continued residence prejudicial to the public weal. True, without an inquiry we cannot know whether membership in the 'Order' is prejudicial; for we cannot tell whether the Attorney General had adequate grounds for 'proscribing' it. On the other hand we cannot say that he did not; and, if the relator has the privilege of inquiring into the grounds, he has been wronged, and the writ should have gone. An alien has no such privilege; unless the ground stated is on its face insufficient, he must accept the decision, for it was made in the 'exercise of discretion,' which we have again and again declared that we will not review.

Nor has the relator any constitutional right to demand that we should. As we have said, any 'legally protected interest' he ever had has been forfeited by 'due process of law'; forfeited as completely as a conviction of crime forfeits the liberty of the accused, be he citizen or alien. The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. *It is a matter of grace, over which courts have no review, unless—as we are assuming—it af-*

firmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant. It is by no means true that 'due process of law' inevitably involves an eventual resort to the courts, no matter what may be the interest at stake; not every governmental action is subject to review by judges." (Emphasis supplied.) *Kaloudis v. Shaughnessy,* 180 F.2d 489, 490-491. See also *Arakas v. Zimmerman,* 200 F.2d 322, at 324.

If the language used by the Board of Appeals has any meaning, it means the Board of Appeals has given petitioner a hearing, and ruled against her, finding the facts "not persuasive that the case merits the exercise of the discretionary authority."

The Board of Appeals did not take the ultimate position that petition was not entitled to have the Board exercise its discretion. It did point out:

(a) that an application for discretionary relief must, by the precise wording of the remedial statute, and by previous Board decisions, be filed during the immigration hearing;

See *Perez-Perez v. Westmoreland,* 122 F.Supp. 385;

(b) That petitioner obviously could not bring herself within such language nor the previous decisions of the Board, but that she should be held to some standard, to-wit, a prompt exercise of any privilege that Congress may have granted her;

(c) that 8 C.F.R. 6.21 required that motions to reopen be supported by affidavits or other evidentiary material. Despite this, petitioner had personally supplied no affidavit, or other showing either with respect (1) to her present membership in the Communist Party, or the lack of it; (2) the extent of her activities while a member, or the lack

thereof; (3) detailed information as to the hardship which she felt would result to her if she were deported.[2]

(d) that 8 C.F.R. 6.21 provides that there shall be included in the motion to reopen, a statement by or on behalf of the moving party declaring whether or not the alien is the subject of any criminal proceedings under Section 242(e) of the Act. Petitioner's motion failed to comply with this requirement.

(e) that where the motion is to secure discretionary relief, there is to be included a statement as to whether or not the alien is subject to *any* pending criminal prosecution. (Emphasis added.) Petitioner's motion failed to comply with this requirement.

Petitioner seeks to excuse compliance with requirement (d) above, upon the ground that the respondent knows the answer. This might perhaps be a sufficient excuse, were it the only omission by petitioner, but it in no way excuses the failure to comply with the requirement of (e) above, which is essential information, going to the very heart of the exercise of clemency sought by petitioner, and relates to facts known only to her.

In petitioner's reply to the Government's return to the order to show cause, she supplies *some* of the "evidentiary material" required by the regulations. For

[2] In this connection it is to be observed that no affidavit of any kind was filed by petitioner herself. The only affidavit filed on behalf of petitioner was that of her attorney. It is denominated "Affidavit," but its first paragraph is a pro forma verification of the petition (also signed by the attorney), and the second paragraph reads as follows:

"That petitioner is prepared to present evidence proving that she is entitled to suspension of deportation under Section 244 (a) (5) of the Act."

This is a pure conclusion, premised on hearsay, arrived at by a person other than the real party in interest. In a similar type of case, an allegation that "the alien had exhausted each and every administrative remedy provided by law" was held a mere conclusion. (*Berreiro v. Brownell*, 215 F.2d 585.)

example, she states specifically under oath she is not the subject of any criminal proceedings under Section 242(a) of the Immigration and Nationality Act, and she states specifically under oath that she is not subject to *any* pending criminal prosecution. (Emphasis added.) She at no time specifically touches upon the further matter mentioned by the Board of Immigration Appeals, when it stated in its order:

> "The respondent (petitioner) declined to testify at the hearing on advice of counsel. The motion to reopen contains no information as to whether the respondent admits that she was a member of the Communist Party, and if so, whether such membership has terminated and the date of termination."

This can hardly be an inadvertent omission. In petitioner's reply to the Government's return on the order to show cause, petitioner "admits that she declined to testify at the hearing in 1949 concerning membership in the Communist Party in 1938 and 1939,"[3] and thereupon, prefers not to make any statement of fact as to present membership in the Communist Party, but instead realleges the conclusion of law that she comes within the provisions of Section 244(a)(b) of the Immigration and Nationality Act of 1952, and is therefore entitled to a hearing and "desires to complete the applicable form," in accordance with the statute and the applicable regulations. This indicates a calculated preference, at this late date, to avoid compliance with the regulations, requiring "affidavits or other evidentiary matter." Such affidavits and matter we conclude, are to be based on facts, and not mere conclusions. The Board of Immigration Appeals and the Attorney General, and the Congress, are entitled to no less in their considera-

[3] These dates are not mentioned in the Board of Immigration Appeals' discussion, but such limitation is inserted by petitioner in her reply to the return on the order to show cause.

tion of the advisability of an act of grace with respect to an alien whose rights and privileges have had for so many years such scrupulous respect. And this, as this Court said in its 1954 opinion, despite, "the administrative findings that" (she) was "not merely a member of the Communist Party in 1938, but that during that period such party advocated and taught the overthrow of the Government of the United States by force and violence and circulated and distributed printed matter so advocating."

There is no question but that the Immigration and Nationality Act of 1952 itself (8 U.S.C.A. Sec. 1103) and the regulations issued thereunder (8 C.F.R. Sec. 6.1(d)) give the Board of Appeals the authority and right to exercise the powers of the Attorney General with respect to any discretionary relief.

Accardi v. Shaughnessy, 347 U.S. 260;

Adel v. Shaughnessy, 183 F.2d 371;

Kavadias v. Cross, 82 F.Supp. 716.

The regulations prescribing procedures to be followed in processing aliens' applications for suspension of deportation, have the force and effect of law.

Accardi v. Shaughnessy, supra.

Petitioner's claim that no discretion was exercised, and that there has been an unlawful refusal to so exercise its discretion is completely answered, first, from a factual standpoint by the specific language used by the Board, and secondly, from a legal standpoint, by the case of *James v. Shaughnessy,* 202 F.2d 519.

In that case, as here, the petitioner raised no question as to the deportation order itself. But he sought there, as petitioner does here, to review the exercise of discretion. Judge Clark said (page 521):

"The premise on which his constitutional argument is based is unsound, and we do not reach any constitutional question on this record. On the contrary, it is abundantly clear that he has been given administrative consideration of his application on the basis of individual merit, or the lack of it, with recognition of his right to make the application. As the opinion of the Board of Appeals disclosed, its decision was an actual exercise of discretion in the light of 'respondent's own statements and other evidence of record.' "

Further, the courts have no reviewing power under the claim of due process of law, unless the denial of discretionary relief was arbitrary. (*Kaloudis v. Shaughnessy*, 180 F.2d 489.) Here it was just the reverse.

Finally, petitioner urges that in cases allegedly similar in facts, the Board of Immigration Appeals has exercised its favorable discretion, and hence, its present refusal to exercise that same favorable consideration herein, constitutes an abuse of discretion. This is disposed of by the Supreme Court's characterization in the *Accardi* case, of such a point as "wholly frivolous." (*Accardi v. Shaughnessy*, 347 U.S. 260, 264, n. 5.) Here the lower court had found an offer of proof in this regard was immaterial.

Under all circumstances here existing, the judgment of the lower court is AFFIRMED.

District Court Decision

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HAZEL ANNA WOLF, *Petitioner,*
vs.
JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Respondent.*
No. 4082

MEMORANDUM DECISION

This matter is before the court upon the filing of a "Petition for Writ of Habeas Corpus, and Order to Show Cause; for Declaratory Judgment and Injunctive Relief," filed February 9, 1956.

The petitioner, Hazel Anna Wolf, was directed to surrender to the respondent for deportation at 2:00 p.m. February 10, 1956, pursuant to an order of deportation issued January 2, 1952, and a warrant of deportation based thereon dated October 6, 1955.

Upon the filing of the petition herein the court issued an order to show cause directing respondent to show cause at 2:00 p.m. on February 10, 1956, why petitioner should not be released pending determination of her rights under the petition and at the same time the court directed that petitioner appear in court at the time of hearing and surrender herself into the custody of respondent until further order of the court. At the time set for appearance under the order to show cause respondent served and filed a return to said order. Following argument of counsel it was orally stipulated in open court that respondent would not demand surrender of the petitioner pending further order of the court. Petitioner was given time to make reply to the return of the respondent and the matter was continued

for further hearing on the petition to February 15, 1956, at 2:00 p.m.

When the matter was called for hearing on February 15 it appeared that there was no substantial dispute as to the facts involved and petitioner's counsel indicated substantial agreement with the facts as alleged in respondent's return. An offer of evidence was made on only one issue, namely, that in similar situations in the past the Board of Immigration Appeals upon the filing of a motion to reopen in substantially the same form as the one filed in this case granted the motion without calling for further showing than was set forth in the motion. The respondent's position as to that issue of fact is that it was irrelevant and immaterial. The court has concluded that that matter is immaterial and evidence should not be taken thereon. However, the court has reached its decision assuming the fact to be as petitioner alleges.

The undisputed facts are that the petitioner was arrested on May 31, 1949. A hearing was commenced on November 9, 1949, and after adjournment was concluded February 12, 1951. On April 10, 1951, the petitioner was found deportable by the Hearing Officer on the charges contained in the warrant of arrest, namely, that she was a member of an organization which advocated the overthrow of the government of the United States and circulated written and printed matter so advocating under the Act of October 16, 1918, as amended, and after entry she was an alien who was a member of the Communist Party of the United States. The decision of the Hearing Officer was adopted by the Commissioner January 2, 1952, and after appeal to the Board of Immigration Appeals the Board dismissed the petitioner's appeal November 5, 1952. An action for judicial review was instituted in this court November 25, 1952, and dismissed February 4, 1953. An appeal was taken

to the Court of Appeals for the Ninth Circuit and the decision of this court was affirmed August 10, 1954. On February 28, 1955, the United States Supreme Court denied certiorari. Thereafter a private bill, S. 1425, was introduced on this petitioner's behalf by Senator Langer and on October 21, 1955, a stay of deportation was granted by the Commissioner until February 1, 1956. A subsequent stay of deportation was granted by the Commissioner until February 10, 1956, upon petitioner's filing of a motion to reopen the deportation proceeding. Petitioner's motion to reopen the proceedings was filed on January 27, 1956, and addressed to the Board of Immigration Appeals. A copy of this motion appears in the margin.[1]

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[1] Comes now Hazel Anna Wolf by and through her attorney, C. T. Hatten, and respectfully moves that the Board of Immigration Appeals reopen the above entitled case.

This motion is based upon the fact that the Immigration and Nationality Act of 1952, 8 U.S.C.A. 1254(a)(5), provides that the Attorney General may suspend deportation and adjust the status of one such as Hazel Anna Wolf, petitioner herein, to that of an alien lawfully admitted for permanent resident.

Petitioner comes within each and every one of the provisions of Section 244(a)(5) of the Immigration and Nationality Act of 1952, in that she is deportable under paragraph (6) of section 241(a) of said Act (although petitioner was ordered deported on January 2, 1952, under the Act of October 16, 1918, as amended) for an act committed or status acquired subsequent to such entry into the United States; she has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of the act or the assumption of the status constituting a ground for deportation and can prove, and offers to prove, that during all of such period she has been and is a person of good moral character. She has not been served with a final order of deportation issued pursuant to the Immigration and Nationality Act of 1952 in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and petitioner is a person whose deportation would result in exceptional and extremely unusual hardship to the alien and to child, her five grandchildren, her sister and her brother, all of whom are citizens of the United States.

Petitioner desires to have her case reopened in order that she may apply for suspension of deportation (form I-256-A) under Section 244 of the Immigration and Nationality Act of 1952, she being entitled as a matter of right to have such application for suspension of deportation

On February 8, 1956, the Board of Immigration Appeals denied the petitioner's motion to reopen the hearings and a copy of its memorandum decision likewise appears in the margin.[2]

[2]This case is before us on counsel's motion for reopening which was filed on January 27, 1956.

On November 5, 1952, we dismissed the respondent's appeal from a decision of the Acting Assistant Commissioner, directing deportation on two charges based on the Act of October 16, 1918, as amended by the Alien Registration Act of 1940, 8 U.S.C. 137. Thereafter, habeas corpus proceedings were instituted by the respondent which resulted in a decision adverse to her in the United States District Court. This judgment was affirmed by the United States Court of Appeals for the Ninth Circuit on August 10, 1954, and a rehearing was denied on October 11, 1954. *Wolf v. Boyd*, 215 F.2d 377 (C.A. 9, 1954). On February 28, 1955, certiorari was denied, 348 U.S. 951.

The present motion seeks to have the hearing reopened to permit the respondent to file an application for suspension of deportation under the provisions of Section 244(a)(5) of the Immigration and Nationality Act. We have previously held that an application for discretionary relief must be submitted during the immigration hearing. *Matter of M.....*, 5 I&N Dec. 472 (1953); *Matter of C.....*, 5 I&N Dec. 630 (1954). In *Marcello v. Bonds*, 349 U.S. 302, 313 (1955), the court said that this Board was not bound to consider the question of suspending deportation on the merits where the alien had failed to make an application for that relief at the hearing before the special inquiry officer. Our decisions in *Matter of M.....* and *Matter of C.....*, *supra*, are not controlling because the respondent was not eligible for suspension of deportation under the legislation which was in effect when the hearing was closed on February 12, 1951. However, they do indicate the necessity for promptness in making such an application.

The Immigration and Nationality Act became law on June 27, 1952, and was effective on December 24, 1952. Over three years have elapsed from the latter date and the motion to reopen contains no explanation for the delay in its submission. We note that the Supreme Court handed down its decision in the respondent's case on February 28, 1955, and that counsel's affidavit in support of the motion is dated March 16, 1955. A serious administrative problem would be created for the Service if we were to sanction a procedure by which counsel could remain inactive until deportation was imminent and then upset the proceeding with a motion to reopen for discretionary relief which apparently could have been submitted at any time after December 24, 1952.

The respondent declined to testify at the hearing on the advice of

heard and to present evidence that she comes within said section of the Act.

This motion is based upon the files and records in this act and upon the affidavit of petitioner's attorney, C. T. Hatten, which is attached hereto and made a part hereof.

It is conceded by petitioner for the purpose of this action at least that all proceedings resulting in the order and warrant of deportation were fair, regular and in compliance with statute and that she was accorded and has exhausted judicial review except so far as it may relate to an application to suspend deportation under the provisions of Section 244 of the Immigration and Nationality Act of 1952.

Petitioner, prior to December 24, 1952, the effective date of the Immigration and Nationality Act of 1952, was not eligible for suspension of deportation, 8 U.S.C. 155(d). It seems clear, however, that under §244(a)(5)

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counsel. The motion to reopen contains no information as to whether the respondent admits that she was a member of the Communist Party and if so, whether such membership has terminated and the date of termination. 8 C.F.R. 6.21 provides that motions to reopen shall be supported by affidavits or other evidentiary material. As applied to this respondent, who is attempting to secure the exercise of administrative discretion, we believe this regulation made it incumbent upon her to furnish her own affidavit concerning the period of her membership in the Communist Party, the extent of her activities while a member, the date when she terminated her membership, and detailed information as to th hardship which would result to her if she is deported.

8 C.F.R. 6.21 also provides that in any case in which a deportation order is in effect, there shall be included in the motion to reopen a statement by or on behalf of the moving party declaring whether or not the alien is the subject of any criminal proceeding under Section 242(e) of the Immigration and Nationality Act and, where the motion is for the purpose of securing discretionary relief, there is to be included a statement as to whether or not the alien is subject to any pending criminal prosecution. The motion fails to comply with these two requirements.

It is well settled that a rehearing in an administrative proceeding is not a matter of right but lies within the discreton of the agency making the order. *United States, et al., v. Pierce Auto Freight Lines, Inc., et al.*, 327 U.S. 515, 535 (1946); *Interstate Commerce Commission, et al., v. City of Jersey City, et al.*, 322 U.S. 503, 514 (1944). The facts asserted in the motion to reopen are not persuasive that this case merits the exercise of the discretionary authority to suspend deportation. After careful review of the record, it is our considered opinion that a reopening of the proceeding is not warranted and counsel's motion will, therefore, be denied.

ORDER: It is ordered that counsel's motion be and the same is hereby denied.

Thos. S. Finucane, Chairman

of the Immigration and Nationality Act of 1952, 8 U.S.C. §1254(a)(5)the Attorney General may, in his discretion, suspend deportation and adjust the status of one such as petitioner to that of an alien lawfully admitted for permanent residence. In any event respondent does not contend otherwise and the Board of Immigration Appeals in acting upon petitioner's motion to reopen proceedings recognized her right to proceed under said Section 244(a)(5) of the Immigration and Nationality Act.

We are not here concerned with the validity of a deportation order. That issue has been passed upon by this court, the court of appeals, with certiorari denied by the Supreme Court. As stated petitioner concedes the validity of the deportation order and we are concerned solely with whether petitioner has been granted procedural due process with respect to an act of grace that may be granted petitioner by the Attorney General upon a showing that she

> "has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence."

It is to be noted that should the Attorney General or his

authorized delegate graciously extend his discretion in favor of a petitioner his act is subject to review and approval by Congress before it can become anything more than a temporary stay of deportation. Section 244(c) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1254(c).

It does appear from the reported decisions that under the 1952 Act persons occupying the status of petitioner are entitled to invoke the discretion of the Attorney General and to insist that the discretion be exercised. *Accardi v. Shaughnessy,* 347 U.S. 260; *Hatzistavrou v. Brownell,* 225 F.2d 26. This right, it would appear from the *Accardi* case, *supra,* springs not solely from the statute itself but because of the regulations promulgated, with the force and effect of law, to supplement the "bare bones" of the Congressional enactment.

It is necessary, therefore, that careful consideration be given the regulations which have been adopted to supplement Section 244 of the Immigration and Nationality Act of 1952.

While aliens occupying the status of petitioner were not eligible for suspension of deportation with the discretion of the Attorney General under the preceding act, aliens deportable for other reasons were and the regulations governing applications for discretionary relief had been in effect governing such procedure. See 8 C.F.R. (1949 Ed.) Part 150; Sections 150.6(g), 150.7(b), 150.8, 150.10.

Following the enactment of the Immigration & Nationality Act of 1952 the regulations applicable to procedures under the new law were revised and renumbered with each part of subchapter B of Chapter I of Immigration Regulations, 8 C.F.R. given the same number as the section of the Immigration and Nationality Act to which it relates. Section 244.2 relates to suspension of deportation and provides:

"An application for suspension of deportation shall be submitted in accordance with, and subject to, the provisions of §242.54(d) of this chapter and shall be determined and disposed of in accordance with the provisions of this part and §242.61 of this chapter."

Section 242.54(d) referred to provides:

"*Application for discretionary relief.* Except in the case of an alien who is *prima facie* deportable under section 242(f) of the Immigration and Nationality Act, at any time during the hearing the respondent may apply for suspension of deportation on Form I-256A or for voluntary departure, under section 244 of the said Act. The burden of establishing that he meets the statutory requirements for discretionary relief shall be upon the respondent. He may submit any evidence in support of his application which he believes should be considered by the special inquiry officer."

Section 242.61, without setting it forth in full, relates to procedure to be followed by the special inquiry officer in reaching and giving notice of a decision as well as appeals therefrom.

All the regulations relating to the matter specifically provide or imply that discretionary relief or applications for suspension of deportation are to be sought during the course of an administrative hearing before a special inquiry officer. See *Perez-Perez v. Westmoreland,* 122 F.Supp. 385.

A careful review of the existing and preceding regulations does not disclose any specially designed procedure applicable to aliens such as petitioner who are subject to orders of deportation issued under laws permitting no discretionary suspension of deportation, but now eligible for such even after administrative hearings and full judicial review have been completed. A

similar situation developed when Congress in 1948 amended the law to permit deportable aliens theretofore ineligible to make application for discretionary relief.

It is the contention of the respondent, as urged before this court now and in similar proceedings in this court (See *Hobson v. Boyd,* No. 3790) and as will be borne out by reference to like proceedings described in reported decisions that the only method whereby one situated as petitioner may apply for suspension of deportation is by first making a motion to the Board of Immigration Appeals to reopen the otherwise closed and completed proceedings. Such motions are governed by Section 6.21, Chapter I, 8 C.F.R., as amended December 8, 1954.

There being no regulation specially directing the manner in which an application for discretionary relief shall be made by one situated as petitioner it would appear that she has been granted procedural due process if, after an over-all evaluation of the procedures used, the facts disclosed and the decision reached, the statutory act of grace permitted the Attorney General actually has been made available to petitioner, accorded consideration and either denied or granted. *Application of Orlando,* 131 F.Supp. 485, affirmed 222 F.2d 537.

Section 103 of the Immigration and Nationality Act of 1952, 8 U.S.C.A. §1103, together with Part 6 of Chapter I, 8 C.F.R., particularly Section 6.1(d) establish the power of the Board of Appeals to exercise the powers of the Attorney General with regard to discretionary relief. See also *Accardi v. Shaughnessy, supra; Perez-Perez v. Westmoreland, supra; Adel v. Shaughnessy,* 183 F.2d 371.

It is petitioner's contention, however, that when the Board of Immigration Appeals denied her motion to re-

open the proceedings for further hearing she was denied an opportunity to apply for discretionary relief. In argument petitioner's counsel further contended that under the statutes and regulations petitioner was entitled as a matter of right to a further hearing before a special inquiry officer on the issue of discretionary relief. As the court has already indicated the law and regulations do not provide a specific procedure for one situated as petitioner and it would appear unreasonable to conclude that Congress in passing a generally more restrictive Immigration and Nationality Act, although permitting the Attorney General in some respects to exercise broader discretionary powers in suspending deportation, intended or implied that one such as petitioner who had already been accorded full and complete administrative and judicial review and found deportable was to be granted *as of right* a new and additional administrative hearing on the sole question of whether or not the Attorney General should suspend deportation as an act of grace. Clearly petitioner was not entitled to a hearing as a matter of right. *Adel v. Shaughnessy, supra.*

Considering in this case the procedure used, the facts disclosed and decision reached, it must be admitted that petitioner's right to ask for discretionary relief was recognized when the Board of Appeals accepted and acted as it did upon the motion to reopen. The Board in its decision reviewed briefly petitioner's record with respect to earlier administrative and judicial proceedings. It indicated its views as to the inadequacy of the showing made in connection with the motion to reopen. While these views were directed in such a manner as to appear related only to procedural defects they likewise show that the Board was familiar with and had considered the merits of petitioner's case. The concluding two

sentences of the final paragraph of the Board's decision reading as follows:

> "The facts asserted in the motion to reopen are not persuasive that this case merits the exercise of the discretionary authority to suspend deportation. After careful review of the record, it is our considered opinion that a reopening of the proceeding is not warranted and counsel's motion will, therefore, be denied."

indicate to the court that the Board after recognizing petitioner's right to apply for suspension of deportation and thus invoke the discretion of the Attorney General reviewed its own record of her case which obviously was before and available to it, considered the showing as made and exercised its discretion on behalf of the Attorney General on the merits of any application for suspension of deportation that might be made as proposed in the motion to reopen and did so unfavorably by denying the motion to reopen deportation proceedings.

The Board's right to rely upon the findings of an earlier hearing on petitioner's deportability in exercising its discretion is supported by *Adel v. Shaughnessy, supra; Kavadias v. Cross,* 82 F.Supp. 716.

The manner in which the discretion is exercised is not a controlling factor where the claim is as here that discretion has not been exercised. *Accardi v. Shaughnessy, supra.*

In the case of *James v. Shaughnessy,* 202 F.2d 519, where an application for suspension of deportation had been denied and the claim was that its denial was not the result of an actual exercise of discretion but of an unlawful refusal to exercise it, Judge Chase in speaking for the Court of Appeals upon relator's appeal from a denial of a writ, affirmed the lower court, stating:

> "The appellant does not now raise any question

as to the deportation order itself. Admittedly he is deportable on the ground above stated; and if his application for the suspension of the order has been duly considered and decision reached on an over-all evaluation of the circumstances shown, this appeal must fail."

So here it is the court's conclusion that petitioner, concededly deportable under a valid order of deportation, has in effect received consideration of an application for suspension of deportation, the application being by way of a motion to reopen proceedings, and a decision was reached thereon by an over-all evaluation of the facts and circumstances revealed by the motion to reopen as well as the record already before the Board as a result of earlier hearings. Under such circumstances the petition should be dismissed.

Findings, if necessary, and order in accordance herewith may be presented, on notice.

DATED February 20, 1956.

WILLIAM J. LINDBERG
United States District Judge.

SUPPLEMENT TO MEMORANDUM DECISION

The memorandum decision given orally, in part, in open court on February 20, 1956, and thereafter filed, was prepared after hearings and argument on February 10 and 15, 1956, on the order to show cause as well as the merits of the petition. On February 15, 1956, the matter was continued by the court to the following Monday, February 20, for decision with the understanding that further evidence would be received at that time should it appear necessary or advisable by the court or either party. As there appeared to be no dispute on material factual issues the court's memorandum decision

was prepared on the assumption that no additional evidence would be offered.

When the matter was called on Monday, February 20, petitioner introduced testimony by Mr. Boyd, District Director, which related to the dates and nature of the proceedings taken with respect to the deportation of petitioner, the usual practice of the Department of Immigration & Naturalization upon the filing of a private bill in Congress to suspend deportation with regard to granting a stay of deportation pending Congressional action on such a bill, and the procedure followed in other similar cases from this district when motions to reopen deportation proceedings were filed for the purpose of making application to the Attorney General for discretionary relief.

Much of the evidence was admitted over objection of respondent although the court entertained serious doubt as to its admissibility.

In any event the court was of the opinion upon the conclusion of the evidence that the testimony so far as it was material and relevant did not serve to materially vary the facts as found or assumed in the memorandum decision and therefore the court orally rendered its decision as already outlined in the memorandum so as to avoid further delay.

In view of the circumstances as above set forth the memorandum decision with this addendum will constitute the court's final decision in the matter.

DATED February 29, 1956.

WILLIAM J. LINDBERG
United States District Judge.

APPENDIX C

1.

In the Matter of
CECIL REGINALD JAY } File: E-053646 Seattle

MOTION TO REOPEN

Appellant above named hereby respectfully moves that the above-entitled Board re-open his hearing, so that he may make application for suspension of deportation, pursuant to appropriate rules and regulations.

This motion is based upon the affidavit of appellant in support of the motion to re-open.

Appellant hereby requests for oral argument on behalf of his motion for reconsideration.

Respectfully submitted,

CAUGHLAN AND HESSE,
Attorneys for Appellant.

STATE OF WASHINGTON }
COUNTY OF KING } ss.

CECIL REGINALD JAY being first duly sworn on his oath deposes and says:

I am the person above named and make this affidavit in support of my motion to re-open my case, so that I may make an application for suspension of deportation, pursuant to Section 244(a)(5) of the Immigration and Nationality Act of 1952. I have been ordered expelled pursuant to the Internal Security Act of 1950, under analogous provisions to those in Paragraph (6) (C) of Section 241(a) of the Act for alleged membership in the Communist Party after my coming to the United States. I have been physically present within the United States for a period of more than ten years immediately following the time of my alleged membership and during that entire period I have been and am now a person of good moral charac-

ter. I have not been served with a final order of deportation issued pursuant to this Act.

My deportation would result in exceptional and extreme hardship to myself in that were I deported to England I would be unable to support myself and I believe I would be ineligible for any pension or relief. I have no means of support in Great Britain and no one who could support me temporarily until and if I was able to become settled and find means of supporting myself. I spent the majority of my productive years in this country and were I to lose my present means of support I have no assurances that I would be able to support myself in the future. I have no contact with any members of my family with the exception of my daughter, who is not able to support me.

I therefore respectfully request that my hearing be re-opened, so that I may seek suspension of the order of my deportation.

CECIL REGINALD JAY

SUBSCRIBED AND SWORN TO before me this 30th day of June, 1953.

JOHN CAUGHLAN
Notary Public for the State of Washington
residing at Seattle.

DECISION OF THE BOARD OF IMMIGRATION APPEALS
August 3, 1953

"In this case the Board dismissed the appeal on December 9, 1952. The record shows that on December 18, 1951, the Acting Assistant Commissioner ordered respondent deported on the ground that after entry respondent, an alien, was a member of the Communist Party of the United States—Act of October 16, 1918, as amended.

"The evidence established that respondent, a native

of England and subject of Great Britain, 61 years of age, testified he last entered the United States at the port of Seattle, Washington, in the fall of 1921; that he was a voluntary member of the Communist Party of the United States from 1935 to 1940.

"The present motion seeks reopening of the hearing to afford the respondent an opportunity to petition for suspension of deportation pursuant to Section 244 (a)(5) of the Immigration and Nationality Act of 1952. The motion is supported by respondent's affidavit. Therein it is set forth that the alien has been present in the United States for a period of more than ten years immediately following the time of his alleged membership and that during such time he has been a person of good moral character; that his deportation would result in extreme hardship to himself. The motion simply asks that the hearing be reopened in order that the respondent may petition for relief under existing law. We do not determine his eligibility for such relief at this time. Since the motion sets forth the *prima facie* case we believe same justifies the reopening of the proceedings for the purpose desired.

"ORDER: It is ordered that the outstanding order of deportation be withdrawn; and

"IT IS FURTHER ORDERED that proceedings be reopened in line with the foregoing.

"THOS. G. FINUCANE
Chairman."

* * * * * * * *

2.

In the Matter of JAMES JOSEPH CRAIN } File: A-1988015 Seattle

MOTION TO REOPEN AND FOR RECONSIDERATION

"Appellant above named hereby respectfully moves that the above entitled Board re-opens his hearing, so

that he may make application for suspension of deportation, pursuant to appropriate rules and regulations and to reconsider its decision heretofore rendered.

"This motion is based upon the affidavit of appellant in support of the motion to re-open and upon the memorandum in support of motion for reconsideration, both attached hereto.

"Appellant hereby requests for all [oral] argument on behalf of his motion for reconsideration.

"Respectfully submitted,

CAUGHLAN AND HESSE
Attorneys for Appellant.

AFFIDAVIT IN SUPPORT OF MOTION TO REOPEN HEARING

"STATE OF WASHINGTON }
COUNTY OF KING } ss.

"JAMES JOSEPH CRAIN, being first duly sworn on his oath deposes and says:

"I am the person above named and make this affidavit in support of my motion to re-open my case, so that I may make an application for suspension of deportation, pursuant to Section 244(a)(5) of the Immigration and Nationality Act of 1952. I have been ordered expelled pursuant to Paragraph (6)(C) of Section 241(a) of the Act for alleged membership in the Communist Party after my coming to the United States. I have been physically present within the United States for a period of more than ten years immediately following the time of my alleged membership and during that entire period I have been and am now a person of good moral character. I have not been served with a final order of deportation issued pursuant to this act, other than the final administrative determination by this Board on January 8, 1953.

"My deportation would result in exceptional and

extreme hardship to myself and to my aged sister, in that were I deported to Ireland, I would be unable to support myself and I would be ineligible for any pension or relief, since I have been informed and believe it to be a fact that I must be 70 years of age prior to obtaining such relief from the government of Eire. I am not at all sure that even upon reaching the age of 70 I would be entitled to relief since I have spent the majority of my productive years in this county. From the foregoing it is obvious that I would be without any means of support and my sister, who is the only person in Ireland upon whom I could possibly call for assistance, is herself on pension and she could not, without extreme financial hardship, undertake to support me in any degree.

"JAMES JOSEPH CRAIN

"SUBSCRIBED AND SWORN TO before me this 27th day of March, 1953.

"JOHN CAUGHLAN
Notary Public for the State of Washington
residing at Seattle."

DECISION OF THE BOARD OF IMMIGRATION APPEALS

May 27, 1953

"This case presents a motion to reopen the proceedings to afford the alien an opportunity to petition for suspension of deportation pursuant to Section 244 (a)(5) of the Immigration and Nationality Act of 1952.

"On January 8, 1953, we dismissed an appeal from an order entered by the Acting Assistant Commissioner on January 21, 1952, directing the alien's deportation on the charge lodged under the Act of October 16, 1918, as amended by the Act of September 23, 1950, in that after entry, the respondent was a member of the Communist Party of the United States.

"In our decision we found that the record affirmatively established that the alien joined the Communist Party in 1935 and was an active member for about two or three months; that he thereafter joined the said party in 1937 and terminated membership in the spring of 1940; that during part of the time that he was a member of said party he served as financial secretary of the unit.

"The present motion is supported by an affidavit executed by the alien before a notary public on March 27, 1953, in which he states that he has been physically present in the United States for a period of more than ten years immediately following the time of his alleged membership and that during that entire period he has been and continues to be a person of good moral character; that his deportation would result in exceptional and extreme hardship to his aged sister as well as himself if he were deported to Ireland.

"Upon a reading of the motion and supporting documents, we will grant the motion.

"ORDER: It is ordered that the outstanding order and warrant of deportation be withdrawn and that the hearing be reopened to afford the alien an opportunity to petition for suspension of deportation under Section 244 of the Immigration and Nationality Act of 1952 and for such further proceedings as may be necessary.

"THOS. G. FINUCANE
Chairman."

* * * * * * * *

3.

"In the Matter of
MIKE BIDDLE GARPH or
MOGOMET GERGIEFF
No.
A-5740870

MOTION TO REOPEN PROCEEDINGS

"Mike Biddle Garph, the alien above named, by and through his attorney, the undersigned, hereby respect-

fully moves for an order reopening the hearing upon the warrant of arrest for deportation dated June 24, 1949. The moving party hereby declares that he will prepare to establish that he is now and has been for more than 20 years last past a law-abiding person, of good moral character, well disposed to the government of the United States and supporting the constitution thereof, and that he has been continuously a resident of the United States and physically present therein since December 21, 1916. Movant states that there is not now pending against him any criminal prosecution and that he has not been prosecuted for any criminal offense at any time during his residence in the United States.

"This motion is filed for the purpose of enabling the movant to apply for a suspension of deportation, and is supported by the affidavits of John Caughlan relating to the residence of the movant and of San Savkueff and Nick Skoff relating to the residence and good character of the movant.

"JOHN CAUGHLAN
Attorney for Petitioner."

"STATE OF WASHINGTON }
COUNTY OF KING } ss.

"JOHN CAUGHLAN, being first duly sworn, on oath deposes and says:

"I am attorney for Mike Biddle Garph (the name Mogomet Gergieff is also used in the Immigration proceedings pending against him). I have been personally acquainted with Mike Biddle Garph since shortly after his arrest on a warrant for deportation which occurred in August, 1949. Since that time I have seen him at frequent intervals of not less than once a month and during periods several times a month. To my personal knowledge he has maintained continual residence in the city of Seattle, Washington, from the time I first

met him until the present time. I assisted him in the preparation of his petition for suspension of deportation and the places of residence listed thereon are the places I know where he has resided in Seattle since I first met him. During a portion of each year since I have met him he has been employed out of the city of Seattle in the capacity of a construction worker, working on various construction projects in Washington and Oregon. During such period, however, he has continued to maintain his domicile in Seattle.

"JOHN CAUGHLAN

"SUBSCRIBED AND SWORN to before me this 17th day of March, 1955.

"VIRGINIA W. BUSICK
Notary Public in and for the State of Washington, residing at Seattle."

(This motion was also supported by the affidavits of two residents of Seattle, Nick Skoff and Sam Savkueff, attesting to the alien's continuous residence in the United States for the previous ten years, and each averring that during all the period that affiant knew the alien he had been "a law-abiding citizen, and had conducted himself as a person of good moral character").

DECISION OF THE BOARD OF IMMIGRATION APPEALS

May 20, 1955

"This matter comes before us on motion to reopen the proceedings in order to afford the respondent the opportunity of making application for suspension of deportation. The respondent is now under an order providing for his deportation from the United States on the lodged charge.

"A careful review of the record indicates that the respondent may meet the basic statutory requirements

to be considered for the requested form of relief. We will therefore order the proceedings reopened to allow the respondent to make application for suspension of deportation and to submit evidence in support of his contention that his case merits the granting of the discretionary relief.

"ORDER: It is ordered that the outstanding order of deportation be withdrawn and the proceedings reopened for the above-stated purposes."

IN THE MATTER OF ANNIE HOBSON	File No. 20-46868 District File No. A3 637 349

MOTION TO REOPEN

Comes now Annie Hobson by and through her attorney, C. T. Hatten, and respectfully moves that the Board of Immigration Appeals reopen the above entitled case.

This motion is based upon the fact that the Immigration and Nationality Act of 1952, 8 USCA 1254 (a) (5), provides that the Attorney General may suspend deportation and adjust the status of one such as Annie Hobson, petitioner herein, to that of an alien lawfully admitted for permanent residence.

Petitioner comes within each and every one of the provisions of said 8 USCA 1254 (a) (5), in that she is deportable under paragraph (6) of section 241 (a) of the Immigration and Nationality Act of 1952. (Although petitioner was ordered deported on May 25, 1932, under the Act of October 16, 1918, as amended) for an act committed or status acquired subsequent to such entry into the United States; she has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of the act or the assumption of the

status constituting the ground for deportation and can prove, and offers to prove, that during all of such period she has been and is a person of good moral character; she has not been served with a final order of deportation issued pursuant to the Immigration and Nationality Act of 1952 in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and petitioner is a person whose deportation would result in exceptional and extremely unusual hardship to the alien and to her children and grandchild who are citizens.

As stated above petitioner was ordered deported on May 25, 1932; that following the passage of the Immigration and Nationality Act of 1952, petitioner did not apply for suspension of deportation at an earlier time because petitioner believed, because of the long period of time which had elapsed since the order of deportation, that she could not and would not be deported. This belief was also based upon the fact that she had made application for passport to England and that this had been denied. Thereafter petitioner was ordered to report for deportation and seeing the need for the first time of affirmative action, petitioner on September 17, 1954, presented and John P. Boyd, District Director Immigration and Naturalization Service, accepted an application for suspension of deportation (form I-256-A) under Section 244 of the Immigration and Nationality Act of 1952.

John P. Boyd, the District Director, refused to process said application for suspension of deportation on the ground that her case had not been reopened and that the petition would not be processed unless the case was reopened.

Petitioner contended that she was entitled to the relief under the Act or, at least, the processing of her pe-

tition in that she came within the statute and had filed the necessary application.

Petitioner now desires however to have the case reopened in order that said application may be processed and upon the reopening of her case or other disposal thereof, dismiss the appeal now pending in the Court of Appeals for the Ninth Circuit, being case No. 14681.

This motion is based upon the files and records in this case, the affidavit of petitioner's attorney, C. T. Hatten, which is attached hereto and made a part thereof and her right to have the Attorney General exercise the discretion given to him under Section 244 (a) (5) of the Immigration and Nationality Act of 1952.

C. T. HATTEN,
Attorney for Petitioner.

State of Washington }
County of King } ss.

C. T. Hatten, being first duly sworn, on oath deposes and says:

That I am the attorney for the above named noncitizen, Annie Hobson; that I have prepared the above and foregoing motion to reopen and I know the contents and know of my own personal knowledge or from the files and records in my possession, that the facts stated in said motion to reopen are true.

That petitioner is prepared to present evidence proving that she is entitled to suspension of deportation under Section 244 (a) (5) of the Act.

That I know of my own knowledge that petitioner is a woman of 71 years of age, unable to earn her own living and resides with a son, daughter-in-law and grandchild, all of whom are citizens of the United States; that she assists the son with whom she resides in and about the household and the deportation of

Annie Hobson would constitute an extremely unusual hardship, seriously jeopardizing her health, and in view of her age and ineligibility to assistance in England, such deportation might well constitute her death warrant. The deportation of a mother under those circumstances also constitutes an extremely unusual hardship to the children and other relatives who are natural born citizens of the United States.

C. T. HATTEN

SUBSCRIBED AND SWORN to before me this 16th day of March, 1955.

V. A. MONTGOMERY,
Notary Public in and for the State of Washington residing at Seattle.

IN THE MATTER OF ANNIE HOBSON } File: A-3637349 } Seattle

DECISION OF THE BOARD OF IMMIGRATION APPEALS

April 26, 1955

This matter comes before us on motion to reopen the proceedings in order that consideration may be given to the alien's application for suspension of deportation under the provisions of Section 244 of the Immigration and Nationality Act.

The record relates to a 67-year-old female, a native and citizen of England, who last entered the United States in 1908. A warrant for her deportation was issued on May 25, 1932, on the ground that she was in the United States in violation of the Immigration Act of 1918, as amended by the Act of June 5, 1920. Deportability is not contested.

In the present action it is averred that the respondent on September 17, 1954, made application for suspension of deportation under the appropriate section of the

Immigration and Nationality Act, but that such application could not be processed until the proceedings were reopened in view of the outstanding warrant of deportation.

The record before us, apparently is not complete, as it contains no current information relating to the respondent's status. The last proceeding shown by the record, before us, were the hearings and related matters which took place in 1932. In view of the long interval since the entry of the warrant of deportation, and counsel's allegation that the respondent can now establish basic eligibility for consideration for suspension of deportation under the Immigration and Nationality Act, we will authorize the reopening of the proceedings for these specific purposes.

ORDER: It is ordered that the outstanding warrant of deportation be withdrawn and the proceedings reopened for the above-stated purposes.

THOS. G. FINUCANE
Chairman.

APPENDIX D

HAZEL ANNA WOLF, *Appellant*,
vs.
JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Appellee*.
No. 13870
August 10, 1954

Appeal from the United States District Court for the Western District of Washington, Northern Division

Before: DENMAN, Chief Judge, STEPHENS and POPE, Circuit Judges

POPE, Circuit Judge:

The Wolf Case

Hazel Anna Wolf was born in Canada; she entered the United States December 26, 1922, for permanent residence and at the time of the institution of the proceedings here referred to she was a resident of Seattle, Washington. On May 31, 1949, she was arrested pursuant to a deportation warrant charging that she was an alien subject to deportation from the United States pursuant to 8 U.S.C.A. Sec. 137, amended by the Alien Registration Act of 1940, 54 Stat. 670,* in that she was after entry a member of an "organization, association, society, or group, that believes in, advises, advocates, or teaches the overthrow by force or violence of the Government of the United States."[1]

Deportation hearings were commenced on June 19, 1950, were continued from time to time and concluded on February 12, 1951.[2] During the course of such hear-

*Now 8 U.S.C.A. Sec. 1182.

[1] The language thus quoted is that of the Act.

[2] The record shows that during the course of the hearing and on the date last mentioned the Government lodged an additional charge under Section 22 of the Internal Security Act of 1950, which was based upon the brief allegation that petitioner was an alien who subsequent to entry became a member of or affiliated with the Communist Party of the

ings the appellant refused to testify. The hearing officer made findings and decision adverse to appellant, and thereafter in due course, the appropriate officer of the Immigration and Naturalization Service adopted Hearing Officer's recommendation and made findings that appellant was a voluntary member of the Communist Party of the United States during the years 1938-1939, and that during the period of appellant's membership therein such Party advocated and taught the overthrow by force and violence of the Government of the United States, and that such party was an organization that circulated and distributed printed matter advocating the overthrow by force and violence of such government.

Upon such findings it was concluded and ordered that appellant was subject to deportation. Appellant appealed to the Board of Immigration Appeals from the order pursuant to such findings and conclusions but the appeal was dismissed and her deportation ordered. The appellant then filed in the court below a petition for a writ of *habeas corpus* alleging that she was unlawfully held in custody by the respondent pursuant to such order of deportation. An order to show cause was issued and after a hearing upon the return filed by the respondent and the reply to such return the court below made findings and conclusions holding that the deportation hearing record supported the findings, conclusions and order made on behalf of the Immigration and Naturalization Service and entered an order dismissing the writ of *habeas corpus* and the order to show cause thereon upon the merits.[3]

[3] Appellant also sought declaratory relief but that portion of her petition was dismissed for want of an indispensable party, and no question is here presented with respect thereto.

United States. The findings disclose and the parties are agreed that the deportation order here under review was based upon the provisions of the statute as it stood prior to the 1950 Act.

No question is raised here as to the sufficiency of the evidence to sustain the findings of the Immigration and Naturalization Service (made on its behalf by the Assistant Commissioner). The appeal presents but two specifications of error. The first is based upon a conclusion of the trial court that: "Past membership in the Communist Party is, as a matter of law, a sufficient ground for deportation of an alien pursuant to the provisions of 8 U.S.C.A. Sec. 137 as it existed prior to amendment of said section by Section 22 of the Internal Security Act of 1950." It is contended that this is an erroneous statement of law in that Title 8 U.S.C.A. Sec. 137 as it existed prior to the amendment of 1950 required proof that the alien had been a member of an organization that advocated and taught the overthrow of the Government of the United States by force and violence.

We find it wholly unnecessary to consider this assignment of appellant. As previously stated, the administrative findings disclose not merely that appellant was a member of the Communist Party of the United States in 1938, but that during that period such Party advocated and taught the overthrow of the Government of the United States by force and violence and circulated and distributed printed matter so advocating. The trial court in its findings specifically recited that such findings had been made and were the basis for the deportation order.

It is therefore apparent that there was no attempt to base an order of deportation upon a mere finding of Communist Party membership without a finding that such Party was an organization that advocated and taught the overthrow of the Government of the United States by force and violence. Thus we are not called upon to determine whether the questioned conclusion of

the trial court is correct as an abstract proposition of law.[4]

Appellant's second and final contention is that: "Deportation for the alleged commission of an Act which Congress did not impose as a condition to a continuation of 'permanent' residence in the United States at the time the non-citizen established such 'permanent' residence in 1922 is either a denial of substantive due process and completely without the constitutional power of Congress or it is in violation of the First Amendment, and the *ex post facto* prohibitions of Article I, Section 9, of the Constitution of the United States." This contention was expressly rejected in *Harisiades v. Shaughnessy,* 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586. The re-affirmation of the principles there expressed in *Galvan v. Press,* 347 U.S. 522, 74 S.Ct. 737, leaves no foundation whatever for the appellant's effort to distinguish or explain away the *Harisiades* case.

The judgment in No. 13,870 is therefore affirmed.

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[4] We are likewise not here required to express any opinion as to whether *Martinez v. Neelly,* 7 Cir., 197 F.2d 462, affirmed by an equally divided court, 344 U.S. 916, 73 S.Ct. 345, 97 L.Ed. 707, supports such a conclusion.

APPENDIX E

In the Matter of
HAZEL ANNA WOLF
Deportation Proceedings

3604-P-39427
A4 671 658

"DECISION OF THE HEARING OFFICER

"Respondent is a native and citizen of Canada, age 53. She has resided in the United States since December 26, 1922, at which time she entered for permanent residence. The proceedings were commenced against the respondent May 31, 1949, at Seattle, Washington, when a warrant of arrest issued May 24, 1949, by the Assistant Commissioner of the Immigration and Naturalization Service, was served on the respondent.

"Charges in the Warrant of Arrest and Notice of Hearing

"The warrant of arrest was addressed to the District Director of the Immigration and Naturalization Service, Seattle, Washington. It commands that Hazel Anna Wolf be taken into custody and granted a hearing to show cause why she should not be deported according to law. The reasons assigned were that after entry she had become a member of deportable classes set forth in Section 1 of the Act of October 16, 1918, as amended. The classes were described as follows:

> " 'An alien who is a member of an organization, association, society, or group that advises, advocates, or teaches the overthrow, by force or violence, of the Government of the United States.
>
> " 'An alien who is a member of an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays any written matter advising, advocating, or teaching the overthrow, by force or violence, of the Government of the United States'."

"*Lodged Charge*

"On February 12, 1951, during the hearing,[1] the Government lodged the following additional charge under the Act of October 16, 1918, as amended by the Internal Security Act of 1950, that the respondent is found to have been, after entry, a member of a class set forth in Section 1 of said Act: an alien who, subsequent to entry into the United States, was a member of the Communist Party of the United States.

* * * * *

"*Issues*

"The following issues were raised by the charges in the warrant of arrest and the charges lodged at the reopened hearing:

(1) Is the respondent an alien and was the respondent an alien at the time of the crucial conduct complained of?

(2) Was the respondent, subsequent to entry into the United States, a member of the Communist Party of the United States?

* * * * *

"*Evidence of Alienage*

"It was stipulated by and between the parties herein that the respondent, Hazel Anna Wolf, was born in Victoria, B.C., Canada, on March 10, 1898, and that she has never acquired United States citizenship; that she was admitted to the United States under the name of (Leo) Hazel Dalziel for permanent residence at Seattle, Washington, on December 26, 1922, on the SS Princess Alice; and that she is not married and does not have any one dependent upon her for support.

"It is concluded, therefore, that at all times material to the issues herein the respondent Hazel Anna Wolf is considered to be and to have been an alien.

---

[1]Title 8 C.F.R. 151(2d).

"Evidence of Membership in the Communist Party of the United States

"Three witnesses were examined by the Government and testified that the respondent Hazel Anna Wolf was a member of the Communist Party in King County, Seattle, Washington, during 1938 and 1939 while the witnesses were also members of the Communist Party. The witnesses testified in substance as follows:

"Kathryn Fogg (R. p. 19) testified that she is a resident of Fairbanks, Alaska, a housewife by occupation, a native of Idaho, and a citizen of the United States; that she formerly resided in Seattle, Washington, and was a member of the House of Representatives of the State of Washington; that she joined the West Seattle Unit of the Communist Party in the fall of 1937, was issued a Communist Party card or book and was after a short time transferred to the White Center Unit of the Communist Party (R. p. 21) and remained in that unit until she left the Communist Party in 1939. She stated that she did not hold office in the Communist Party but she was a delegate to the King County Convention of the Communist Party in the spring of 1938 and to the National Convention of the Communist Party of the United States in May, 1938. She testified that she was acquainted with the respondent, Hazel Anna Wolf, having first met her subsequent to becoming a member of the Communist Party in late 1937 or thereabouts.

"She related how she had occasion to meet the respondent at various meetings which they attended, among them Communist Party meetings (R. p. 22). The witness specifically described one Communist Party meeting that she attended at which the respondent Hazel Anna Wolf was present which she described as a Communist Party fraction meeting of the Workers Alliance held in the King County Workers Alliance

headquarters at Seattle, Washington. The witness stated that she particularly remembered that Mrs. Wolf was present at this meeting because Mrs. Wolf explained to the witness the reason she (the witness) had been called to the meeting, *viz*: because she had not been sufficiently aggressive as a member of the Communist Party in the Workers Alliance group (R. p. 23).

"The witness further testified that the respondent was at another Communist Party meeting which she attended. This meeting took place in Seattle, Washington, subsequent to May, 1938. The top leaders of the Communist Party were in attendance and the persons present were taken to task by the Northwest District Organizer of the Communist Party. The witness also testified that Hazel Anna Wolf had told the witness that she was a member of the Communist Party and that it was necessary for her to change from one unit of the Communist Party to another because of her work in the organization known as the Workers Alliance. The witness based her knowledge of the respondent's membership on her attendance at meetings of fractions of the Communist Party which were attended only by Communist Party members and, in addition, the fact that she had discussed with the respondent her Communist Party membership.

"Clifford H. Smith (R. p. 142)—The witness testified that he first met the respondent, Hazel Anna Wolf, in 1937 and 1938 when she was secretary of the Seattle, Washington, Council of the Workers Alliance; that he subsequently saw her in two fraction meetings of the Communist Party. The first meeting was held during the State Convention of the Workers Alliance in 1939 at the I.O.G.T. Hall in Seattle, Washington. The second meeting was held in a private residence in Seattle, Washington. Both meetings were outgrowths of the Communist Party fraction which controlled or sought

to control the Workers Alliance organization. The first was called to determine the strategy to elect state officers in the Workers Alliance and the second was called because the Communist Party orders were not carried out in the first instance and for the further purpose of rectifying the acts done because of the breach. The witness related that the fraction meeting at which he and the respondent were present was told to elect one Harold Brockaway as State Secretary of the Workers Alliance at the election. The witness testified that the respondent and others approached him and urged him to run for the position; that he did and was subsequently nominated and elected; that about one month later the Northwest Organizer, one Rappaport, called the second meeting referred to by the witness; that such meeting was held at a private home in Seattle and was attended by ten or twelve persons; that the Northwest District Organizer vehemently denounced certain persons in attendance for the part that they took in having the witness nominated and elected as State Secretary of the Workers Alliance and, as a result, the witness was directed to resign as Secretary of the Workers Alliance so that one Harold Brockaway could be appointed by the State Executive Board. The witness stated that he subsequently tendered his resignation and such action led to his leaving the Communist Party.

"The witness further testified that at this meeting Hazel Anna Wolf was expelled from the Communist Party by the direct action of the Northwest District Organizer of the Communist Party, a person by the name of Rappaport. Witness testified that Rappaport stated that was because of Hazel Anna Wolf's participation in the activities of the delegation that disobeyed Communist Party orders.

"H. C. Armstrong (R. p. 168) testified that he was born in Portland, Oregon, November 26, 1892, was a

citizen of the United States, resided at 1324 Lakeside Avenue South, Seattle, Washington, and that he had previously used the name of J. F. Bush when he applied for membership in the Communist Party. He stated that he was presently a cashier; that he served in the State Legislature about twelve years and that he joined the Communist Party in the summer or fall of 1936 at Seattle, Washington, and was assigned to the professional unit, No. 50, and that he subsequently belonged to other units of the Communist Party such as the unit of the 33d legislative district.

"The witness testified that he paid dues during the time of his membership and was issued a Communist Party book or card; that he was dues secretary of the industrial unit and was a member of the King County Central or Executive Committee of the Communist Party; that he left the Communist Party in the summer of 1940.

"The witness testified that he met the respondent Wolf in 1935 or 1936. He stated that he could not place Mrs. Wolf in many meetings of the Communist Party but that he knew in his own mind that she was present in Communist Party fraction meetings and that he particularly remembers one Communist Party fraction meeting at which she was in attendance. This particular meeting was called by Communist Party leaders and attended by the top fraction of the Communist Party leaders in the organization known as the Workers Alliance of Washington; that the meeting took place in the late winter of 1939 or early 1940 and was held in the home of a Mr. and Mrs. Spickler situated about a block and a half north of Providence Hospital in Seattle, Washington; that everyone present was a known member of the Communist Party and that there were only ten or twelve at the meeting; that he remembers this meeting particularly because one Rappaport, the District Or-

ganizer, who was the highest Communist Party official living in King County, directed that the respondent be expelled from the Communist Party. The witness stated that he knew that the respondent was a member of the Communist Party because of the number of closed Communist Party meetings that they attended together.

"The foregoing evidence submitted to establish that the respondent was a member of the Communist Party during 1938 and 1939 consists of the testimony of witnesses who are recalling events which transpired over twelve years ago. The knowledge of the respondent's membership in the Communist Party is predicated upon the witnesses' and the respondent's contemporaneous activities in the Communist Party fraction which was used to control or influence an organization called the Workers Alliance. The force of the contemporary events which were outlined by the witnesses leaves little doubt that their memories would not have to be unusual to permit recollection of events which were momentarily important to the witnesses and the respondent at the time such events took place. The witnesses clearly distinguished between these meetings and meetings of the Workers Alliance, an organization which was composed of many non-Communists. The witnesses' testimony certainly sets up a series of circumstances from which membership in an organization such as the Communist Party can be inferred.

"It was established on cross-examination that the witness Armstrong prior to and about 1940 consistently denied in affidavits that he was a member of the Communist Party. The seriousness of the alleged disregard for the oath was established. It would be permissible for a trier of facts to conclude that his respect for the oath is no greater today. It would be difficult to pursue this assumption to a logical conclusion in view of the testimony of witness Smith whose credibility is unim-

peached and who corroborated witness Armstrong's testimony concerning the meeting at which the respondent was ostensibly expelled by the Northwest District Organizer of the Communist Party.

"The evidence presented by these witnesses was not denied by the respondent although an opportunity to testify was given to her several times during the hearing. The record contains no evidence to rebut the testimony of these witnesses.

"From the evidence submitted, it is concluded that Hazel Anna Wolf was a member of the Communist Party of the United States during 1938 and 1939 and that she was active in its fraction activities in the Workers Alliance. The conclusion is fortified by the failure of the respondent to testify or to produce any evidence to the contrary which, in itself, may be considered as evidence in this case.

* * *

"*Findings of Fact*: Upon the basis of all the evidence presented, it is found:

(1) That the respondent is an alien, a native and citizen of Canada;

(2) That the respondent last entered the United States for permanent residence at Seattle, Wa hington, December 26, 1922, on the SS PRINCESS ALICE;

(3) That the respondent was a member of the Communist Party of the United States at least during the years 1938 and 1939.

* * *

Conclusion of Law: Upon the basis of the foregoing findings of fact, it is concluded:

* * *

That under the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950, Public Law 831, 81st Congress (8

U.S.C. 137), the respondent is subject to deportation on the following grounds:

That after entering the United States she became a member of the Communist Party of the United States.

* * *

"DECISION: It is ordered that the alien be deported from the United States, pursuant to law . . ."

"JOHN W. KEANE
Hearing Officer"

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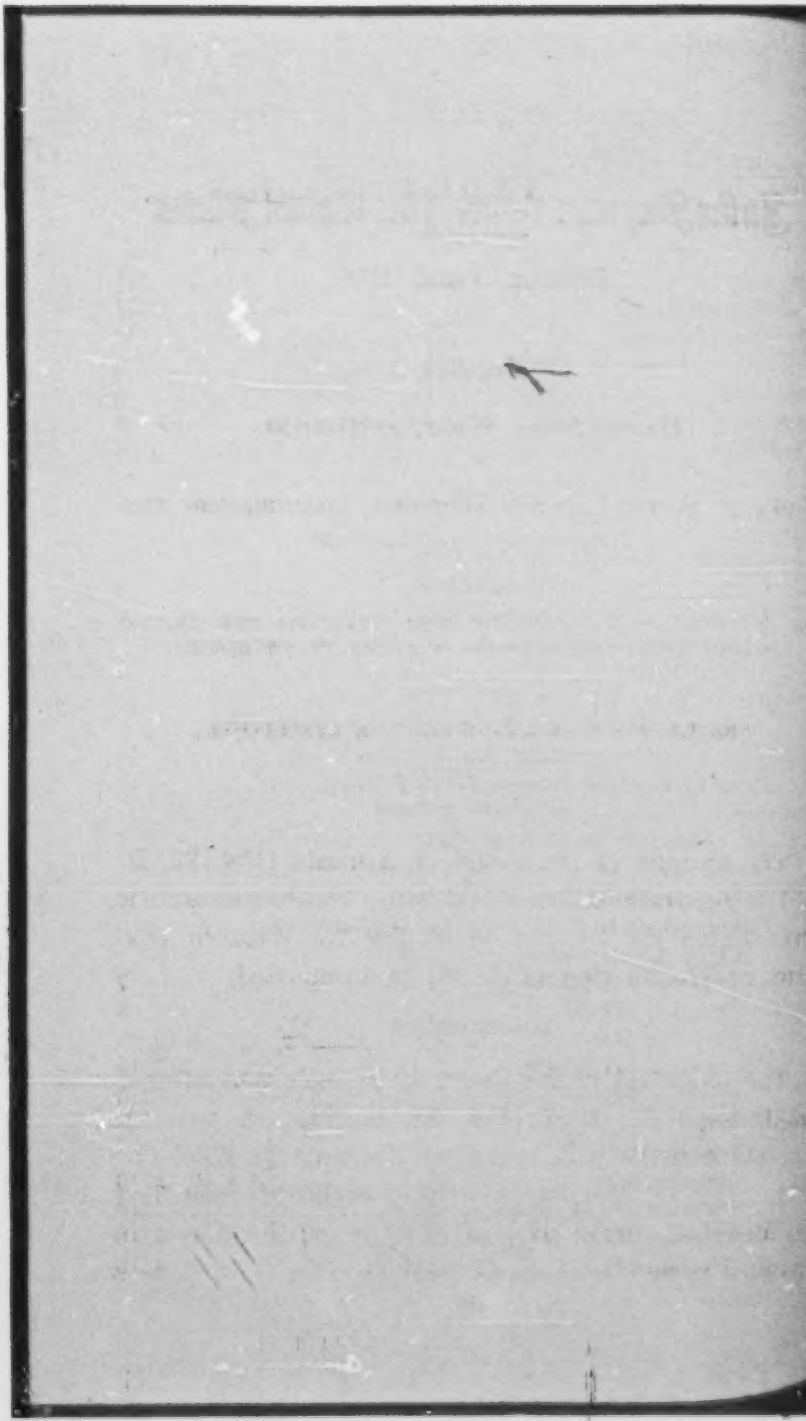

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 822

HAZEL ANNA WOLF, PETITIONER

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 22, R. 66) is reported at 238 F. 2d 249. The memorandum decision of the District Court for the Western District of Washington (Pet. 36) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1956 (Pet. 22, R. 78). A petition for a rehearing was denied on January 19, 1957 (R. 79). The petition for a writ of certiorari was filed on March 7, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in refusing to reopen the concluded deportation proceedings to permit petitioner to apply for suspension of deportation.

STATUTE AND REGULATIONS INVOLVED

Section 244 (a) (5) and (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 214, 8 U. S. C. 1254 (a) (5) and (c) provides in relevant part:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * * * *
>
> (5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to

this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

* * * * *

(c) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (4) or (5) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. * * *

* * * * *

Pertinent sections of Immigration Regulations, Title 8, Code of Federal Regulations, read in relevant part as follows:

SECTION 6.21 *Motion to reopen or motion to reconsider*—(a) *Form.*

Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument if desired shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decisions as are pertinent. In any case in which a deportation order is in effect, there shall be included in the motion to reopen

or reconsider that order a statement by or on behalf of the moving party declaring whether or not the subject of the deportation order is also the subject of any pending criminal proceeding under section 242 (e) of the Immigration and Nationality Act and, if so, the current status of that proceeding. If the motion to reopen or reconsider is for the purpose of seeking discretionary relief, there shall be included in the motion a statement by or on behalf of the moving party declaring whether or not the alien for whose relief the motion is filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the district director, or the officer in charge having administrative jurisdiction over the case.

* * * * *

SECTION 244.2 *Suspension of deportation.*

An application for suspension of deportation shall be submitted in accordance with, and subject to, the provisions of Sec. 242.54 (d) of this chapter and shall be determined and disposed of in accordance with the provisions of this part and Sec. 242.61 of this chapter.

SECTION 242.54 *Contents of record; evidence—*

* * * * *

(d) *Application for discretionary relief.*

Except in the case of an alien who is prima facie deportable under section 242 (f) of the act, at any time during the hearing the re-

spondent may apply for suspension of deportation on Form 1–256A, for voluntary departure under section 244 of the act, or for both voluntary departure and preexamination. The burden of establishing that he meets the statutory requirements for discretionary relief shall be upon the respondent. He may submit any evidence in support of his application which he believes should be considered by the special inquiry officer.

SECTION 242.61 *Decision of special inquiry officer*—(a) *Preparation of written decision.*

Except as provided in paragraph (b) of this section and Sec. 242.76, the special inquiry officer shall, as soon as practicable after the conclusion of the hearing, prepare a written decision signed by him which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law, as to deportability, unless such findings and conclusions are waived by the respondent orally during the hearing or by written waiver after the conclusion of the hearing. If the respondent has applied for discretionary relief in accordance with the provisions of Sec. 242.54 (d), the decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such application. The decision shall be concluded with the order of the special inquiry officer as provided in paragraph (c) of this section.

* * * * *

STATEMENT

On April 10, 1951, petitioner, a Canadian national, was found deportable by a hearing officer, under the

Act of October 16, 1918, as amended, on charges that she was a member of an organization which advocated the overthrow of the government of the United States and circulated written and printed matter so advocating, and that after entry she was an alien who was a member of the Communist Party of the United States (Pet. 66–74). After exhausting administrative remedies with respect to this decision,[1] petitioner sought judicial review on November 25, 1952, in the District Court for the Western District of Washington, questioning the sufficiency of the evidence to sustain the findings made in the deportation proceedings (Pet. 37, 63). This action was dismissed on February 4, 1953 (Pet. 37), and the Court of Appeals for the Ninth Circuit affirmed on August 10, 1954, pointing out, with regard to the two specifications of error there made, that it was wholly unnecessary to consider one, and that the other (questioning the constitutionality of the statute) had been expressly rejected by the decisions of this Court in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, and *Galvan* v. *Press*, 347 U. S. 522 (Pet. 62–65, 215 F. 2d 377). On February 28, 1955, this Court denied certiorari (348 U. S. 951).

The present proceeding arises in connection with petitioner's alleged right to apply for suspension of deportation pursuant to Section 244 of the Immigration and Nationality Act of 1952, *supra*, pp. 2–3. In this regard, petitioner filed on January 27, 1956, some

[1] The decision of the hearing officer was adopted by the Commissioner of Immigration and Nationalization on January 2, 1952, and petitioner's appeal to the Board of Immigration Appeals was dismissed on November 5, 1952 (R. 53).

eleven months after the denial of certiorari by this Court,[2] a motion to reopen addressed to the Board of Immigration Appeals (R. 15). She stated therein, through her attorney, that she came within each and every one of the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952 in that she was deportable under Section 241 (a) (6) of the Act (although ordered deported on January 2, 1952, under the 1918 Act) for an act committed or status acquired subsequent to her entry, and that she had been physically present in this country for a continuous period of not less than ten years immediately following the commission of the act or the assumption of the status. She stated that she could prove that during all of such period she had been and was of good moral character, that she had not been served with a final order of deportation issued pursuant to the 1952 Act, and that her deportation would result in exceptional and extremely unusual hardship to her and to her citizen child, grandchildren, and sister and brother. Attached to the motion, but dated March 16, 1955, was an affidavit of counsel certifying that the facts stated therein were true and that petitioner was prepared to prove that she was entitled to suspension of deportation (R. 17).

Upon the filing of this motion, a stay of deportation was granted by the Commissioner until February 10, 1956 (R. 53). On February 8, 1956, the Board issued

[2] In the interim, Senator Langer introduced in Congress a private bill, S. 1425, on petitioner's behalf and the Commissioner, on October 21, 1955, granted a stay of deportation until February 1, 1956 (R. 53). Apparently no action was taken upon the bill (see the opinion of the Court of Appeals (R. 24)).

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an order denying the motion (R. 18–20). The order noted that promptness was essential in applying for suspension of deportation and that, although petitioner had not been eligible for such suspension under the legislation in effect at the time her deportation hearing was concluded on February 12, 1951, her application for relief could have been submitted at any time after December 24, 1952, the effective date of the 1952 Act. Petitioner's motion contained no explanation for the delay in its submission.

Additionally, the Board noted that petitioner had declined to testify at her deportation hearing and that the motion to reopen contained no information as to whether she admitted that she was a member of the Communist Party and, if so, whether and when such membership had been terminated. It expressed the view that, in the light of the regulation providing that a motion to reopen be supported by affidavits or other evidentiary material (8 C. F. R. 6.21), it was incumbent upon petitioner to furnish *her own* affidavit concerning the period of her membership in the Communist Party, the extent of her activities while a member, the date when she terminated her membership, and detailed information as to the hardship which would result to her if she were deported. It further noted that the regulation provided that a motion to reopen should include, in a case such as this, statements as to whether the alien was the subject of any criminal proceeding under Section 242 (e) of the 1952 Act, or subject to any other pending criminal prosecution, and that petitioner's motion

failed to comply with these requirements. The order concluded:

> * * * The facts asserted in the motion to reopen are not persuasive that this case merits the exercise of the discretionary authority to suspend deportation. After careful review of the record, it is our considered opinion that a reopening of the proceeding is not warranted and counsel's motion will, therefore, be denied.

Petitioner was directed to surrender for deportation at 2 p. m. on February 10, 1956 (pursuant to the order of deportation issued January 2, 1952, and the warrant of deportation based thereon, dated October 6, 1955) (Pet. 36).

On February 9, 1956, she filed in the District Court a "Petition for Writ of Habeas Corpus, and Order to Show Cause; for Declaratory Judgment and Injunctive Relief," alleging that she had been improperly denied the right to be heard on the question of eligibility for suspension of deportation and to the exercise of discretion by the Attorney General (R. 1–6). The court issued an order to show cause (R. 7–8) and after hearings and argument (R. 56) dismissed the petition (Pet. 47, 48; R. 56–57). The Court of Appeals affirmed.

ARGUMENT

Petitioner has conceded that she has been validly ordered deported and that she has exhausted her opportunities for administrative and judicial review with respect to that order. She alleges now that she has been denied due process in that she has not been afforded the right to apply for suspension of depor-

tation under Section 244 (a) (5) of the Immigration and Nationality Act of 1952 in the manner and form prescribed by the regulations. However, as we show below, there is no specially designed procedure applicable to an alien of petitioner's status, and the Board of Immigration Appeals has properly exercised the discretion of the Attorney General in the circumstances of this case.

As both courts noted below, existing regulations which supplement Section 244 (8 C. F. R. 244.2, 242.54 (d), 242.61, pp. 4–5, *supra*) contemplate that the right of suspension of deportation be sought during the course of the deportation hearing. See *Accardi* v. *Shaughnessy*, 347 U. S. 260; *Perez-Perez* v. *Westmoreland*, 122 F. Supp. 385 (S. D. Calif.). These procedural requirements are not applicable to petitioner since her hearing was concluded prior to December 24, 1952, the effective date of the 1952 Act, and she was not eligible for suspension of deportation under the preceding Act.[3] The method, therefore, whereby an alien like petitioner may apply for suspension of deportation is by making a motion, under 8 C. F. R. 6.21 (p. 3, *supra*), to the Board of Immigration Appeals to reopen the closed proceedings. That this is the proper procedure is borne out by the copies of documents comprising the record in alleged "similar cases" printed by petitioner in Appendix C to her petition (Pet. 49–61) "solely to illustrate the established procedure in cases where the administra-

[3] See Section 19 (d) of the Immigration Act of 1917, as amended by the Act of June 28, 1940, 54 Stat. 672.

tive record was closed prior to the effective date of the 1952 act" (Pet. 12, fn. 13).

This is not to say, however, that it is likewise "established procedure" that the Board must in every case grant the motion to reopen for further proceedings. Certainly with respect to the power of suspension which is itself discretionary (*Jay* v. *Boyd,* 351 U. S. 345, 354) the Board has discretion to determine whether a petition presents sufficient facts to justify reopening. Cf. *Hintopoulos* v. *Shaughnessy,* No. 205, this Term, decided March 25, 1957. In this case, as both courts below held, the Board was fully justified in denying the motion to reopen because petitioner's motion was untimely and did not contain adequate information.

Petitioner became eligible for the discretionary relief of suspension of deportation on December 24, 1952 (when the 1952 Act became effective), at a time when an action for judicial review of her deportation order was pending in the District Court. Upon the dismissal of the action on February 4, 1953, she chose not to apply for discretionary relief but instead appealed from the dismissal, urging grounds which the Court of Appeals found either utterly devoid of merit or previously rejected by this Court (Pet. 64, 65). Review by this Court was denied on February 28, 1955. 348 U. S. 951. In the interim, petitioner asked for Congressional help in the form of a private bill which resulted in the granting of a stay of deportation, from October 21, 1955 until February 1, 1956 (R. 53). Petitioner did not ask for discretionary relief after the order of this Court or the granting

of the stay. Despite the fact that her application to reopen was apparently prepared some time before (counsel's accompanying affidavit being dated March 16, 1955, p. 7, *supra*), she waited until January 27, 1956—five days before the expiration date of the stay granted by the Commissioner—to file the motion. The motion contained no explanation for the delay[4] and the circumstances preceding its submission are certainly suggestive of dilatory tactics. As the Board has pointed out, a serious administrative problem would be created if a procedure were sanctioned whereby an alien could remain inactive until deportation was imminent in 1956 and then upset the proceeding with a motion to reopen for discretionary relief which could have been submitted at any time after the effective date of the 1952 Act (Pet. 25).

Even at that late date, petitioner's motion to reopen was deficient in that it did not comply with 8 C. F. R. 6.21, *supra*, p. 3, the regulation governing the submission of a motion to reopen. It made no statement with respect to pending criminal proceedings or prosecutions and was unsupported by affidavit

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[4] Petitioner states in her reply to the Government's return to the order to show cause (R. 21):

"* * * That following the denial of the petition for certiorari to the Supreme Court of the United States on February 28, 1955 as referred to in said return, petitioner was permitted to remain in the United States solely by virtue of the inaction of respondent and the Commissioner of Immigration and Naturalization Service from that date until the Commissioner ordered deportation on February 1, 1956. Petitioner had prepared a motion to reopen for the purpose of applying for suspension of deportation and did not file said motion for the sole reason that petitioner was not then threatened with imminent deportation; * * *."

or evidentiary material other than the affidavit of counsel certifying that the bare allegations of the motion (that she came within each and every one of the provisions of Section 244 and could prove the same) were true. See *supra,* pp. 6–7. More significant, the motion made no mention of a matter obviously basic to her right to discretionary relief—her past or present membership, or lack of it—in the Communist Party. Here was an alien who had been found deportable on charges that she was a member of an organization which advocated the overthrow of the United States government and circulated written and printed matter so advocating. At her hearing concluded as late as 1951, she declined to testify or produce any evidence to the contrary (Pet. 73). The 1952 Act requires a showing of at least ten years of nonmembership in the Communist Party in order for the alien to be eligible for suspension (*supra,* p. 2).[8] Under these circumstances, the issue of her loyalty went to the essence of the question of whether special relief should be accorded; it was a "new fact * * * to be proved * * * supported by affidavits or other evidentiary material" (8 C. F. R. 6.21, *supra,* p. 3). Her continued silence with regard to her background

[8] The court below found a "calculated preference" on the part of petitioner at the time of the commencement of the present proceedings to avoid compliance with the regulations requiring affidavits or evidence with respect to the question of membership in the Communist Party (Pet. 33). It based this conclusion on the fact that, in her reply to the Government's return to the order to show cause, she supplied evidentiary material with respect to the subject of criminal proceedings or prosecution but preferred not to make any statement of fact as to present membership in the Communist Party (Pet. 33).

in the light of the uncontradicted earlier finding of membership, and her reluctance to make a full and frank disclosure with respect to a finding which she must have known was relevant to her application, was sufficient reason in itself for the Board to exercise its discretion to deny the motion to reopen. See *Jimenez* v. *Barber,* 235 F. 2d 922 (C. A. 9), pending on petition for a writ of certiorari, No. 467, this Term.

An examination of the "similar cases" relied upon by petitioner compels the conclusion that the Board has in each case allowed the motion to reopen (thus paving the way for a separate consideration of suspension) on the basis of such factors as: the record of the prior proceedings, including the testimony, if any, of the alien; the interval of time between the issuance of the warrant of deportation and the request for relief and the asserted reason for any delay in the request; the strength of the affidavits accompanying the request; and the grounds for deportation.[6] Considering those factors here, the Board could properly find the motion to reopen insufficient to justify further delay in deportation.

[6] For example, *In the Matter of Annie Hobson* (Pet. 61), where there was a long interval of time between the issuance of the warrant of deportation in 1932 and the filing of the motion to reopen in 1955, the motion set forth reasons for the delay. In *Cecil Reginald Jay* (Pet. 49), *James Joseph Crain* (Pet. 52), and *Mike Biddle Garph* (Pet. 55, 56), the affidavits were either detailed personal affidavits of the alien or affidavits attested to by others on personal knowledge. Note the references in the orders of the Board to the records in *Jay* (where the alien testified as to his membership in the Communist Party, Pet. 51) and *Crain* (where there was an affirmative showing of termination of membership in the Communist Party, Pet. 54).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 822

HAZEL ANNA WOLF, *Petitioner*,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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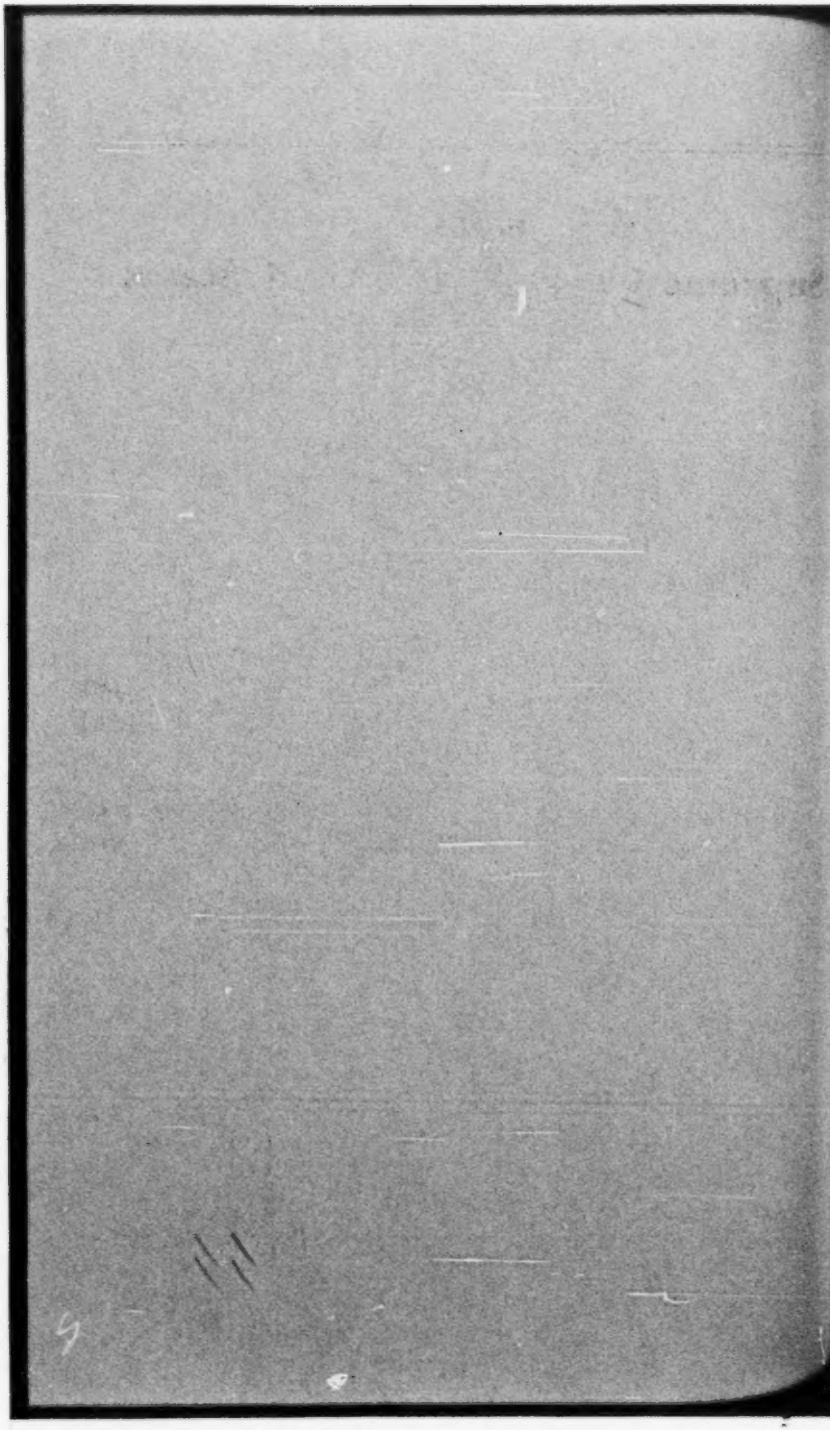

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this court grant rehearing of its order of April 22, 1957, denying the petition for writ of certiorari, 1 L.ed.2d 759, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case, as prayed for in the petition filed March 7, 1957, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Petitioner, after thirty-five years of continuous residence in the United States, is to be deported to her native Canada *without having been permitted to make application* for the discretionary relief of suspension of deportation. Denial to petitioner of the right to make application for discretionary relief, a right af-

forded to "any alien" by Congress, is a denial of due process of law which, under the Fifth Amendment, should prevent the deportation of petitioner at least until she has been afforded the opportunity to exercise that right. The abridgment of petitioner's right *to apply* for exercise of discretion in the manner afforded all other aliens constitutes a clear denial of due process of law.

Petitioner was ordered deported as one "who was a member of the Communist Party during 1938 and 1939" under the provisions of the Act of October 16, 1918, as amended by section 22 of the Internal Security Act of 1950, 8 U.S.C.A. §137. She has never been served with a "final order of deportation issued pursuant to" the Immigration and Nationality Act of 1952. Thus petitioner falls directly within a class to which the relief of suspension of deportation first became available under the Immigration and Nationality Act of 1952.

The 1952 act made "significant changes with respect to the discretionary authority" of the Attorney General and "substantially revise[d] the existing provisions of Section 19 (c) of the Act of February 5, 1917, relating to suspension of deportation."[1]

Most significant here was the specific statutory provision that "any alien" might make "application" to the Attorney General for discretionary relief. The significance of this change is best illustrated by reference to the statute as it existed *prior* to 1952, section 19 (c) of the Act of February 5, 1917, 8 U.S.C.A.

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[1]House Report No. 1365, 82nd Cong., 2nd Sess., page 61.

§ 155(c), as amended, which reads in pertinent part as follows:

> "In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien . . . if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. * * * "

There is no reference under this section to any affirmative action on the part of the alien. The Attorney General could consider an alien's case with a view to suspension of deportation or could refuse to consider it. See *Arakas v. Zimmerman,* 200 F.2d 322 (3d Cir. 1952); *U.S. ex rel. Adel v. Shaughnessy,* 183 F.2d 371 (2d Cir. 1950); and *Kavadias v. Cross,* 82 F.Supp. 716 (N.D. Ind., 1948), reversed on other grounds, 177 F.2d 497 (7th Cir. 1949); *U.S. ex rel. Zabadlija v. Garfinkel,* 173 F.2d 222 (3d Cir. 1949). Due process of law required only that if the Attorney General did by regulation provide a hearing on an application for suspension of deportation, such hearing must be conducted in accordance with the applicable regulations. *U.S. ex rel. Accardi v. Shaughnessy,* 347 U.S. 260. Cf. *Jay v. Boyd,* 351 U.S. 345.

The 1952 statute substantially changed the provisions relating to application for suspension of deporta-

tion, not only by extending the provisions of suspension procedure to new classes of aliens, including "subversives," but also for the first time granted to all aliens the statutory right to make application for discretionary relief and to establish their eligibility for the relief in such manner as might be prescribed by the Attorney General.

The statute as redrafted, 8 U.S.C.A., § 1254 (c), reads:

> "(c) *Upon application by any alien* who is found by the Attorney General to meet the requirements of paragraph . . . (5) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. . . ." (Emphasis added)

The words, "upon application by any alien," add a new ingredient to the 1952 act which was not found in section 19 (c) of the 1917 act. Prior to the passage of the 1952 act, an alien had only such right to apply for suspension of deportation as might be afforded by the regulations promulgated by the Attorney General. No reference was made to "application" in subdivision (c) of section 19 of the 1917 act.

Under section 244 (a) (5) and (c), an alien appears to be entitled to make an "application" for suspension of deportation as a matter of right, afforded by the changed language of this section. In addition, the alien is entitled to such procedures for his benefit as may have been established by regulations of the Attorney General.

The regulations in this case establish precisely what is meant by "application" or "upon application by

any alien." This is defined by 8 C.F.R. 450.1, which provides that "the following forms are hereby prescribed by the Attorney General for use in compliance with the provisions of this chapter: * * * Form No. . . . I-256A . . . Application for Suspension of Deportation."[2]

Under section 244 (c) of the 1952 act, the words "upon application" might be thought at first to have some relation to a general procedure. However, the regulations established by the Attorney General preclude any such interpretation. Form I-256A is specifically prescribed as *the* "application for suspension of deportation." This form obviously defines the term "application." Since "any alien" is assured of the right to exercise of the Attorney General's discretion "upon application," denial to any alien of the right to make an application at all—that is, of his right to proceed under Form I-256A—is a clear denial of that due process of law established by statute and amplified by pertinent and consistent regulations.

Failure of the court below to redress this denial of due process calls for the exercise of this court's supervisory power through certiorari.

2. Petitioner's relationship with the Communist Party was so "nominal" as not to make her a member within the meaning of section 22 of the Internal Security Act of 1950, or section 1251 of the Immigration and Nationality Act of 1952. This was not specifically

[2]Form I-256A is a three-page form printed on both sides and folded endwise to form a 7½-inch by 10½-inch paper consisting of 46 separate questions pertaining to the history, nationality, entry, character, conduct, residence, etc., of the alien.

raised below, and the court indicated that no question was involved as to petitioner's "deportability" as a matter of substantive law. It was noted, however, that the Board of Immigration Appeals, in denying petitioner's motion to reopen proceedings in her case for the purpose of filing an application for suspension of deportation, made "a careful review of the entire record" (Petition for certiorari, page 27). This record consisted of but two things: (1) The administrative record upon which the substantive order of deportation was based—and this related entirely to matters involving petitioner's alleged activities in the year 1939 and earlier; and (2) petitioner's motion to reopen proceedings for the purpose of applying for suspension of deportation.

Since the motion to reopen was denied, the administrative record in the substantive proceedings was not included as a part of the file in the court below. However, that court had previously considered the substantive record in *Wolf v. Boyd,* 215 F.2d 377, cert. den. 348 U.S. 951. The decision of the court below in the earlier case is set forth in full in Appendix D, petitioner's Petition for Certiorari, pages 62 to 65. The decision of the hearing officer in the administrative proceedings is set forth in pertinent part in Appendix E, petitioner's Petition for Certiorari, pages 66 to 74. This decision of the hearing officer includes an analysis of all of the evidence relating to petitioner's alleged membership in the Communist Party. It is apparent from this analysis that petitioner's sole connection with the Communist Party arose out of her membership in and work with the Workers Alliance, an organization of unem-

ployed with which she was active during the years 1937, 1938 and 1939. This membership and activity in the Workers Alliance resulted in a nominal membership in the Communist Party. The administrative record reveals that petitioner's loyalty to the Workers Alliance brought her into conflict with the Communist Party and resulted in a termination of her "nominal membership" in the latter organization, *i.e.*, her expulsion therefrom. Grave question exists as to whether such membership, so limited in scope as to be merely nominal, constitutes grounds for deportation at all. See *Galvan v. Press*, 347 U.S. 522, at page 529; *Rowoldt v. Perfetto*, cert. granted 350 U.S. 993, where one of the two questions before the court is "whether the petitioner had been a member of the Communist Party as that term was defined in *Galvan v. Press* . . . or whether he had been only a nominal member and therefore not subject to deportation." The important question of whether as a matter of substantive law petitioner is deportable underlies this case, and certiorari should be granted to prevent deportation of petitioner until this question has been decided.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JOHN CAUGHLAN
DWIGHT N. STEVENS
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the rules of this court.

JOHN CAUGHLAN